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Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders

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I. INTRODUCTION

The following snapshots of seemingly diverse prosecutions illustrate the potential breadth of duress as a defense for battered women:

> • *In Alabama, a judge sentenced Judith Neelley to death after a jury convicted her of the capital murder and kidnapping of a thirteen year old girl that Neelley admittedly lured from a shopping mall. Neelley contended that she had killed the girl at the direction and under the control of her husband, who had brainwashed Neelley, through physical and sexual torture, to carry out his criminal deeds.*[1]

> • *In Chicago, Marcia Bohach pled guilty to charges that she engaged in a two-year conspiracy to possess and distribute 500 pounds of marijuana. Bohach, who had suffered more than 25 years of previous sexual, physical, and emotional abuse, claimed that she was terrified of her abusive co-conspirator and, notwithstanding his residence in Arizona, believed that she must do anything he told her.*[2]

> • *In Hawaii, Barbara Lee Sebresos entered a conditional guilty plea to charges stemming from a four-year scheme to embezzle over $130,000 from a union. Sebresos argued that the primary beneficiary of all embezzled funds was her husband who controlled her conduct through years of physical and mental abuse.*[3]

> • *In West Virginia, a jury convicted Debra Lambert of welfare fraud. At trial, Lambert presented evidence of prior physical abuse from her husband, including evidence that on several occasions he had beaten and threatened her after she had informed him of her desire to inform the welfare department of his employment.*[4]

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[1] Neelley v. State, 494 So. 2d 669, 670–71, 677 (Ala. Crim. App. 1985), *aff'd*, 494 So. 2d 697 (Ala. 1986), *cert. denied*, 480 U.S. 926 (1987), *denial of post conviction relief aff'd*, 642 So. 2d 494 (Ala. Crim. App. 1993), *writ quashed as improvidently granted*, 642 So. 2d 510, (Ala. 1994), *cert. denied*, 115 S. Ct. 1316 (1995); *see also infra* notes 155 and 289.

[2] Charles J. Aron, *In Defense of Battered Women—Is Justice Blind?*, 20 HUM. RTS. Q. 14, 15 (Fall 1993) (citing United States v. Marsha Bohach, 91 C.R. 63 (N.D. Ill.)); Mary Wisniewski, *Is "Battered Syndrome" a Defense to Drug Charges?*, 137 CHI. DAILY L. BULL., Dec. 3, 1991, at 1 [hereinafter "Wisniewski, *Battered Syndrome*"]; Mary Wisniewski, *Defense Request for Expert on Abuse Rejected*, 137 CHI. DAILY L. BULL., Dec. 17, 1991, at 3 [hereinafter "Wisniewski, *Defense*"].

[3] United States v. Sebresos, No. 91-10193, 1992 U.S. App. LEXIS 17757 (9th Cir. 1992).

[4] State v. Lambert, 312 S.E.2d 31 (W. Va. 1984).

> • *In California, a jury convicted Debra Romero of one count of second degree robbery and four counts of attempted robbery. Romero established that she had been battered daily by her live-in boyfriend, who would beat her if she did not get money to support his drug addiction or if she refused to do what he wanted.*[5]
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> • *In Ohio, Edna Engle pled no contest to murder in connection with the scalding death of her four-year old son. At trial, Engle sought to establish that her husband, who was convicted in the son's death, beat and threatened her to keep her quiet.*[6]

Though the seriousness and circumstances of their respective crimes differ widely, each of these women shared a common defense strategy: each asserted that she had been the victim of severe physical, sexual, and/or psychological abuse and that she had committed her offense at the compulsion of her male batterer, *i.e.*, under duress. Similar accounts of battered women who allegedly commit criminal offenses at their abusers' insistence increasingly fill pages of newspapers and legal reporters. Some of these women admit to participating in violent offenses such as murder,[7]

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[5] People v. Romero, 13 Cal. Rptr. 2d 332 (Cal. Ct. App. 1992), *vacated on other grounds*, 883 P.2d 388 (Cal. 1994).

[6] Jim Woods, *Edna Engle Enters Plea of No Contest in Death of Son, 4*, COLUMBUS DISPATCH, Sept. 9, 1992, at 1A.

[7] Neelley v. State, 494 So. 2d 669, 670–71 (Ala. Crim. App. 1985) (murder of 13-year old girl), *aff'd*, 494 So. 2d 697 (Ala. 1986), *cert denied*, 480 U.S. 926 (1987), *denial of post conviction relief aff'd*, 642 So. 2d 494 (1993), *writ quashed as improvidently granted*, 642 So. 2d 510, *cert. denied*, 115 S. Ct. 1316 (1995); People v. Smith, 608 N.E.2d 1259 (Ill. App. Ct. 1993) (mother convicted of force-feeding acid to her infant); State v. Dunn, 758 P.2d 718 (Kan. 1988) (two counts felony murder), *habeas corpus granted sub nom.* Dunn v. Roberts, 758 F. Supp. 1442 (D. Kan. 1991), *aff'd*, 963 F.2d 308 (10th Cir. 1992); McDonald v. State, 674 P.2d 1154 (Okla. Crim. App. 1984) (life sentence plus 20 years for first degree murder and assault and battery with intent to kill); State v. Bockorny, 863 P.2d 1296 (Or. Ct. App. 1993) (life without parole for aggravated murder committed with husband), *review denied*, 870 P.2d 220 (Or. 1994); McMaugh v. State, 612 A.2d 725 (R.I. 1992) (first degree murder); *see also* Rorie Sherman, *Acceptance of Defense Is Up for Battered Women*, NAT'L L.J., Feb. 4, 1991, at 3 (reporting on clemency granted to battered woman on death row for being an accessory with her abuser in killing spree that left eight dead); Kathryn Kahler, *Women on Death Row: Chilling Sign of the Times*, PLAIN DEALER, May 26, 1993, at 1A, 10A (reporting on youngest woman on death row in 1990 who murdered a Florida man while her boyfriend videotaped the killing).

kidnapping,[8] robbery,[9] burglary,[10] and child abuse.[11] Many commit drug offenses[12] that often carry stiff mandatory penalties.[13] Still others admit to property crimes like fraud,[14] embezzlement,[15] and shoplifting.[16]

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[8] *Dunn*, 963 F.2d at 310; *Neelley*, 494 So. 2d at 671.

[9] United States v. Simpson, 979 F.2d 1282 (8th Cir. 1992) (aiding and abetting armed bank robbery); *Dunn*, 963 F.2d at 310 (aggravated robbery); *Romero*, 13 Cal. Rptr. 2d at 333 (robbery, attempted robbery).

[10] Kessler v. State, 850 S.W.2d 217 (Tex. Ct. App. 1993) (burglary of a habitation).

[11] Commonwealth v. Ely, 578 A.2d 540 (Pa. Super. Ct. 1990) (endangering welfare of child, incest, corruption of minor); *see also* John Ellement, *Battered Woman Defense OK'd in Abuse Case*, THE BOSTON GLOBE, Oct. 20, 1994 at 30; Dan McGrath, *Abused Mom Still Must Protect Kids*, SACRAMENTO BEE, Sept. 18, 1994, at A2; Angela Phillips, *The Abuse that Paralyzes; Angela Phillips on the Battered Wife Who Must Pay Twice Over for Her Daughter's Death*, THE GUARDIAN, Jan. 28, 1992, at 13; Woods, *supra* note 6.

[12] United States v. Willis, 38 F.3d 170 (5th Cir. 1994) (carrying a firearm during commission of drug trafficking crime), *cert. denied*, 115 S. Ct. 2585 (1995); United States v. Johnson, 956 F.2d 894 (9th Cir. 1992) (defendants were low-level operatives in large drug operation); United States v. Santos, 932 F.2d 244 (3d Cir. 1991) (seven counts cocaine-related criminal activity), *cert. denied*, 502 U.S. 985 (1991); United States v. Sixty Acres in Etowah County, 930 F.2d 857 (11th Cir. 1991) (possession with intent to distribute), *reh'g denied*, 952 F.2d 413 (11th Cir. 1991); United States v. Gaviria, 804 F. Supp. 476 (E.D.N.Y. 1992) (intentional possession of cocaine with intent to distribute); Sloan v. State, No. CA CR 88-35, 1988 WL 70743 (Ark. Ct. App. July 6, 1988) (delivery of controlled substance; possession with intent to deliver); State v. Vanzant, No. 64010, 1993 Ohio App. LEXIS 5220 (Ohio Ct. App. Oct. 28, 1993) (drug trafficking; possession of criminal tool); State v. Baker, No. 13-91-46, 1992 Ohio App. LEXIS 3745 (Ohio Ct. App. July 16, 1992) (aggravated drug trafficking); State v. Sisson, No. 9-88-36, 1990 WL 121493 (Ohio Ct. App. Aug. 22, 1990) (drug trafficking).

[13] For a discussion of the obstacles that battered offenders face at sentencing, see *infra* part V.D.

[14] United States v. Homick, 964 F.2d 899 (9th Cir. 1992) (federal wire fraud and conspiracy in connection with false affidavit); United States v. Gregory, No. 88 CR 295, 1988 U.S. Dist. LEXIS 10060 (N.D. Ill. Sept. 2, 1988) (scheme to defraud United States in connection with false tax returns and refunds); State v. Torres, 657 P.2d 1194 (N.M. 1983) (obtaining merchandise by fraud); State v. Lambert, 312 S.E.2d 31, 32 (W. Va. 1984) (welfare fraud).

[15] United States v. Sebresos, No. 91-10193, 1992 U.S. App. LEXIS 17757, at *1 (9th Cir. July 22, 1992) (15 counts of embezzlement).

[16] Barbara Fitzsimmons, *A Hostage Is Freed; Battered Wife Released from Jail, Cleared of Check-Kiting, Theft Charges*, SAN DIEGO UNION TRIB., June 28, 1992, at D1.

Unlike "standard" duress cases, the batterer-coercer is often either absent or not immediately threatening the woman at the time she commits these crimes.[17] Frequently, battered women assert duress to multiple crimes occurring over an extended period of time.[18] Indeed, the batterer may not explicitly demand that the woman commit the specific crime with which she is charged. The woman, instead, may act at the batterer's "uncoerced" suggestion that she engage in illegal activity or out of some generalized, albeit well-founded, fear of future abuse unless she obtains money to support her family or placate her abuser.[19] Because a battered woman often does not have the proverbial "gun to her head" during commission of her crime, she may not satisfy many of the restrictions traditionally imposed on the defense of coercion.[20] Not surprisingly, courts in these cases struggle to define the appropriate role that this alleged duress

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[17] *See, e.g.*, *Homick*, 964 F.2d at 906 (ex-husband out of town at time he allegedly requested that defendant falsify affidavit); Neelley v. State, 494 So. 2d 669, 693 (Ala. Crim. App. 1985) (woman armed and traveling in separate vehicle during much of couple's criminal exploits), *aff'd*, 494 So. 2d 6978 (Ala. 1986), *cert denied*, 480 U.S. 926 (1987), *denial of post conviction relief aff'd*, 642 So. 2d 494 (Ala. Crim. App. 1993), *writ quashed as improvidently granted*, 642 So. 2d 510 (Ala. 1994), *cert. denied*, 115 S. Ct. 1316 (1995); State v. Vanzant, No. 64010, 1993 Ohio App. LEXIS 5220, at *2 (Ohio Ct. App. October 28, 1993) (battered woman sold drugs to bail abuser out of jail); State v. Baker, No. 13-91-46, 1992 Ohio App. LEXIS 3745, at *15 (Ohio Ct. App. July 16, 1992) (threat from jailed boyfriend); McDonald v. State, 674 P.2d 1154, 1155 (Okla. Crim. App. 1984) (woman held gun while husband bludgeoned victims); *see also* Wisniewski, *Defense*, *supra* note 2, at 3 (Bohach's abuser in Arizona during drug conspiracy and would only visit defendant in Illinois once a month).

[18] *See, e.g.*, *Sebresos*, 1992 U.S. App. LEXIS 17757, at *1 (embezzlement scheme over four-year period); United States v. Santos, 932 F.2d 244, 253 (3d Cir. 1991) (distribution of cocaine on six occasions over period of almost one year); *Gregory*, 1988 U.S. Dist. LEXIS 10060, at *3 (34 month scheme to defraud); People v. Romero, 13 Cal. Rptr. 2d 332, 334–35 (Cal. Ct. App. 1992) (five robberies/attempted robberies over one-month period of time), *vacated on other grounds*, 883 P.2d 388 (Cal. 1994); State v. Dunn, 758 P.2d 718, 722 (Kan. 1988) (two and one-half week crime spree), *habeas corpus granted sub nom.* Dunn v. Roberts, 758 F. Supp. 1442 (D. Kan. 1991), *aff'd*, 963 F.2d 308 (10th Cir. 1992).

[19] *See, e.g.*, State v. Barnes, 489 So. 2d 402, 403 (La. Ct. App. 1986) (defendant's drug addicted husband forced her to cash worthless checks to support his habit).

[20] While some courts treat "coercion" as a defense technically distinct from "duress," *see infra* notes 121–25 and accompanying text, many courts and legislatures view the two terms as synonymous. Unless indicated otherwise, this Article uses the terms "coercion" and "duress" interchangeably.

should play in defense of "battered offenders."[21]

In this Article, I explore whether the "battered woman defense,"[22] as currently formulated in the self-defense context, comports with the present parameters and underlying rationale of duress itself. I conclude that excusing battered offenders in non-traditional cases of alleged coercion would require either an explicit or implicit downward adjustment in the ordinarily stringent requirements of classic duress. Such a modification would further require that the principles of criminal responsibility themselves be altered to speak in a more caring and individualistic voice attuned to the plight of a much broader class of defendants than battered women alone. Absent such adjustments, consideration of the coercion undoubtedly experienced by many battered offenders must be relegated to sentencing, where duress and the battered woman syndrome should play a prominent role in mitigation of punishment.

The Article begins, in Part II, by considering the potential

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[21] The term "battered offenders" will herein specifically refer to battered women allegedly coerced into crime by their abusers.

Some courts view battered offenders as having a psychological weapon trained on them throughout the course of their criminal conduct. These courts readily permit battered women to submit even "non-traditional" claims of duress to the fact-finder and to support this defense with both lay and expert testimony concerning the abuse and its psychological effects. Often, these courts analogize to the numerous cases holding similar testimony relevant to the self-defense claims of battered women who kill their abusers, often in apparently non-confrontational situations. *See infra* part V.B.

Most courts, however, refuse to stretch the traditional confines of duress to encompass battered offenders. These courts reserve duress for the truly "extraordinary" case presenting an immediate, clear, and unavoidable choice between the commission of a crime or serious physical harm to the defendant or another. Individual psychological incapacity caused by subtle and ongoing physical or psychological abuse, however coercive, will not excuse battered offenders. Instead, these courts consider such abuse and coercion as relevant, if at all, solely to mitigate punishment at sentencing. *See infra* part IV.B.

[22] Most courts recognize that the battered woman syndrome does not constitute a separate legal defense that gives battered women some unique right to kill or otherwise engage in illegal activity. *See Romero*, 13 Cal. Rptr. 2d at 337 n.8; People v. Yaklich, 833 P.2d 758, 761 (Colo. Ct. App. 1991); Hawthorne v. State, 408 So. 2d 801, 805 (Fla. Dist. Ct. App.), *review denied*, 415 So. 2d 1361 (Fla. 1982); State v. Stewart, 763 P.2d 572, 577 (Kan. 1988). Instead, and as used herein, the term "battered woman defense" refers to the evidentiary use of expert and lay testimony concerning domestic violence in order to bolster a battered woman's credibility or to support the substantive elements of her defense.

ramifications of expanding duress to excuse battered offenders.[23] Given the prevalence of domestic violence, as well as the dramatic increase in the arrest and imprisonment rates for women, duress constitutes a much broader and more legally significant defense for battered women than self-defense, on which virtually all legal commentary currently focuses.[24]

Notwithstanding its potentially greater significance, however, the duress asserted by battered offenders relies heavily upon the psychological and legal theories utilized in battered women's self-defense work. To provide necessary foundation, then, Part III briefly examines the nature of the battered woman syndrome[25] and the role it currently plays in circumventing the obstacles that battered women often encounter under traditional self-defense doctrine.[26]

Parts IV and V then explore recent attempts to extend the battered woman defense, by analogy, beyond self-defense to cases of alleged duress. Part IV examines the traditional elements of duress and the roadblocks currently confronting battered offenders under that classic formulation.[27] Part V explores possible means of circumventing those obstacles, whether through the explicit or implicit modification of duress itself, or via

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[23] *See infra* notes 31–51 and accompanying text.

[24] While a voluminous amount of scholarship concerns battered women's self-defense work, *see infra* note 52, scholars have paid relatively little attention to the potentially broader use of the battered woman syndrome to support a defense of duress. The limited literature on this point is reflected in the following works: Susan D. Appel, Note, *Beyond Self-Defense: The Use of Battered Woman Syndrome in Duress Defenses*, U. ILL. L. REV. 955 (1994); Aron, *supra* note 2 at 14–17; Charles J. Aron, *Women Battered By Life and Law Lose Twice*, 15 NAT'L L.J., July 19, 1993 at 13; Meredith Blake, *Coerced Into Crime: The Application of Battered Woman Syndrome to the Defense of Duress*, 9 WIS. WOMEN'S L.J. 67 (1994); Beth I.Z. Boland, *Battered Women Who Act Under Duress*, 28 NEW ENG. L. REV. 603 (1994); Juanita Brooks, *Creative Defenses and Desperate Defenses*, LITIGATION, Winter 1992, at 22; Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994); Monique Gousie, *From Self-Defense to Coercion:* McMaugh v. State*—Use of Battered Woman's Syndrome to Defend Wife's Involvement in Third-Party Murder*, 28 NEW ENG. L. REV. 453 (1993); Eilis S. Magner, *Case and Comment on Runjanjic/Kontinnen*, 15 CRIM. L. J. 445 (Australia) (1991).

[25] The term "battered woman syndrome" refers to the behavioral and psychological reactions of women subjected to severe, long-term physical and psychological domestic abuse. *See* LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984). For a detailed discussion of the battered woman syndrome, see *infra* notes 53–67 and accompanying text.

[26] *See infra* notes 68–115 and accompanying text.

[27] *See infra* notes 116–209 and accompanying text (part IV).

increasing sentencing discretion.[28]

Parts VI and VII conclude by examining which, if any, of those options comport with the underlying nature of duress,[29] as well as principles of criminal responsibility.[30] Given the objective nature of duress, as well as the principles of personal accountability and free choice that underlie our criminal justice system, the battered woman defense, as employed in practice today, cannot fit within the narrow confines of duress as an exception to the general rule of culpability for crimes knowingly and voluntarily committed. Instead, the subjective coercion presently embodied in the battered woman defense seems most appropriately accounted for through increased sentencing discretion.

II. BATTERED OFFENDERS

No one knows precisely how many women in this country are "coerced"[31] into crime by abusive male intimates. While I have located no formal study on the issue, statistics concerning domestic violence, in conjunction with those concerning female crime, indicate that many female offenders are battered women who commit their offenses under fear, domination, or coercion of an abusive partner.

Domestic abuse constitutes the leading cause of injury to women in this country.[32] Although statistical descriptions of the magnitude of the problem vary widely, most would agree that "woman abuse"[33] is a pervasive social

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[28] *See infra* notes 210–89 and accompanying text (part V).

[29] *See infra* notes 290–368 and accompanying text (part VI).

[30] *See infra* notes 369–419 and accompanying text (part VII).

[31] Of course, some of the difficulty in determining this statistic flows from the difficulty of defining "coercion" itself. I use the term loosely in this section to include physical or emotional compulsion that might fall short of the requirements of the legal excuse of duress.

[32] Battering causes more injuries to women than rapes, muggings, and automobile accidents combined. Cynthia L. Pike, *The Use of Medical Protocols in Identifying Battered Women*, 38 WAYNE L. REV. 1941, 1941 n.3 (1992); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 523 & nn.11–14 (1992).

[33] Although some courts and commentators refer to domestic violence as "spousal abuse," men perpetrate almost ninety percent of intra-family abuse and principally women suffer serious injuries from battery. *See* Robert Geffner & Alan Rosenbaum, *Characteristics and Treatment of Batterers*, 8 BEHAV. SCI. & L. 131, 131 (1990); *see also* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1194 n.9 (1993); Schneider, *supra* note 32, at 540 & n.80.

problem in the United States, affecting anywhere between 1.5 to 6 million women annually[34] and transcending all economic, racial, ethnic, religious, and educational boundaries.[35] Although demographically distinct, then, a significant number of women in this country can legitimately be termed "battered women."[36]

Women also commit crimes, including "traditionally female" crimes like prostitution, larceny-theft, fraud and forgery;[37] drug-related

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[34] Lack of reporting, as well as the inherent play in all statistics, make the magnitude of domestic violence difficult to quantify. These factors, along with differing definitions of battering itself, probably account for the wide statistical variance in the number of women battered annually. *See* Shelley A. Bannister, *Battered Women Who Kill Their Abusers: Their Courtroom Battles*, *in* IT'S A CRIME—WOMEN AND JUSTICE 316, 317 (Roslyn Muraskin & Ted Alleman eds., 1993) (more than 1.5 million battered women); Coughlin, *supra* note 24, at 6 & n.13 (between 2 and 4 million women); *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1574 n.1 (1993) [hereinafter "*Developments*"] (1.6 to 4 million); Geffner & Rosenbaum, *supra* note 33, at 131 (more than 2 million women); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 11 & n.42 (1991) (1.5 million to 3.4 million women); Victoria Mikesell Mather, *A Skeleton in the Closet: The Battered Woman Syndrome, Self Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 545–46 & nn.2–5 (1988) (between 2 and 6 million women). Numerous other statistical descriptions seek to capture the vast dimensions of domestic abuse. *See, e.g.*, Dutton, *supra* note 33, at 1210 ("physical aggression occurs in one-fourth to one-third of all marital couples"); Geffner & Rosenbaum, *supra* note 33, at 131 (20–25% of families experience one or more incidents of domestic violence); Mahoney, *supra*, at 10–11 & nn. 39–41 (women are physically abused in 12% of all marriages; 50% or more of women will be battered at some time in their life); Mather, *supra*, at 545–56 & nn.2–5 (one-half to two-thirds of marriages experience at least one battering incident during relationship); Schneider, *supra* note 32, at 523 & nn.11–14 (woman beaten every 18 seconds).

[35] *See* Julie Blackman, *Emerging Images of Severely Battered Women and the Criminal Justice System*, 8 BEHAV. SCI. & L. 121, 122 (1990) (reporting on case histories that demonstrate the real demographic and psychological diversity that exists among battered women); Mather, *supra* note 34, at 548 & n.25 (noting that "battering cuts across all social, economic, religious, racial, and ethnic lines"). While domestic violence appears to transcend class and racial lines, Elizabeth Schneider cautions that a "significant gap exists in the discourse and literature about battering in communities of color." Schneider, *supra* note 32, at 532 n.45.

[36] That is not to say that all women who are battered suffer from the "battered woman syndrome," which generally requires repetitive instances of severe, long-term abuse. *See infra* notes 53–67 and accompanying text.

[37] *See* RONALD BARRI FLOWERS, DEMOGRAPHICS AND CRIMINALITY: THE CHARACTERISTICS OF CRIME IN AMERICA 77 (1989); Phyllis Chesler, *A Woman's Right*

offenses;[38] and crimes of violence, including homicide.[39] Although women comprise only a small fraction of the United States prison population,[40] the percentage of women incarcerated in state and federal correctional facilities has dramatically increased over the last decade, at a rate far outpacing that of male offenders.[41]

Myrna Raeder, who has studied the impact of the Federal Sentencing Guidelines upon female offenders, asserts that the victimization of women

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to Self-Defense: The Case of Aileen Carol Wuornos, 66 ST. JOHN'S L. REV. 933, 937 & nn.11-13 (1993); Imogene L. Moyer, *Women's Prisons: Issues and Controversies*, *in* IT'S A CRIME—WOMEN AND JUSTICE 193, 198-99 (Roslyn Muraskin & Ted Alleman eds., 1993); Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 912 n.21 (1993).

[38] *See* FLOWERS, *supra* note 37, at 80 (37% of increase in female arrests from 1978 to 1987 due to drug abuse violations); Chesler, *supra* note 37, at 937 & n.13 (increased drug use and tough drug penalties responsible for increased female prison population); Moyer, *supra* note 37, at 199 (researchers report drug abuse related to offenses for which women incarcerated); Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Females Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 216 (1994) (more females sentenced in federal system for drug offenses than for any other type of offense); Raeder, *supra* note 37, at 912 (drug offenders now account for significant portion of female federal criminals); James L. Tyson, *Mandatory Sentences Lead to Surge of Women in Prison*, CHRIST. SCI. MON., Nov. 29, 1993, at 1, 18 (one out of three women prisoners serving time for drug related offenses in 1989).

[39] *See* Mather, *supra* note 34, at 562 & nn.123-25; Moyer, *supra* note 37, at 199, 205.

[40] Women comprise less than six percent of the United States prison population. *See* Chesler, *supra* note 37, at 937; Moyer, *supra* note 37, at 193, 205.

[41] *See* FLOWERS, *supra* note 37, at 80 (comparing a 33% increase in total female arrests from 1978 through 1987 with a 23% increase in male arrests during same period); Chesler, *supra* note 37, at 937 n.13 (noting that the number of female prisoners tripled in the 1980s, compared to doubling for men); Raeder, *supra* note 37, at 922, 925 (stating that the percentage of female federal inmates grew at a faster rate than men from 1984 through 1990); Tyson, *supra* note 38, at 1 (noting that in twelve years following 1980, the number of women in state and federal prisons increased by 275%, compared to 160% increase for male inmates). Experts advance varied reasons for this increase in the female prison population. Some attribute the increase to less paternalistic attitudes of law enforcement and a greater willingness to incarcerate women. *See* Moyer, *supra* note 37, at 206. Others cite the "get-tough" societal attitude toward crime. *See* Raeder, *supra* note 37, at 923 & n.79. Most also credit stringent mandatory minimum drug penalties. *See* Chesler, *supra* note 37, at 937; Raeder, *supra* note 37, at 923 & n.79; Tyson, *supra* note 38, at 1, 18.

often fosters their involvement in criminal activity.[42] Although their surrounding circumstances may not constitute legal duress, many offenses committed by women arise out of "efforts to accommodate . . . male intimates"[43] who dominate the female offenders.[44]

For a battered woman, a male intimate may exert more than mere domination. Studies indicate that nationwide as many as one-half of all female inmates are victims of battering.[45] Experts on domestic violence posit that many battered women are currently incarcerated for crimes that they committed under the coercion of an abusive male. For example, Dr. Lenore Walker, a clinical psychologist who has extensively treated and studied battered women, estimates that up to one-half of the women currently in prison in this country committed their offenses to avoid further beating:[46]

> Forging checks to pay his bills, stealing food or other items he denied the children, selling drugs to keep his supply filled, hurting someone else so he didn't hurt her were all acts committed under the control of the batterer's threat of, or actual, violence. Some women struck back, most often with great force and usually in self-defense. Few of these women received an appropriate defense for their acts. Most listened to their attorneys' suggestions to avoid trial and plead guilty, often to a lesser negotiated plea rather than pursue a duress or diminished-capacity

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[42] Raeder, *supra* note 37, at 977.

[43] *Id.* at 988.

[44] *Id.* at 973 & n.412.

[45] Mather, *supra* note 34, at 562 & n.129; Tyson, *supra* note 38, at 18. While battering cuts across all socio-economic groups, *see supra* note 35, research strongly suggests that the female prison population disproportionately draws from poor and uneducated segments of society, as well as racial and ethnic minorities. *See* Moyer, *supra* note 37, at 197; Raeder, *supra* note 37, at 910–11; Tyson, *supra* note 38, at 18.

[46] WALKER, *supra* note 25, at 142. Dr. Walker, who coined the term "battered woman syndrome," has authored numerous other books and articles concerning battered women and their treatment by the legal system. *See, e.g.*, LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (1989) [hereinafter "WALKER, TERRIFYING LOVE"]; LENORE E. WALKER, THE BATTERED WOMAN (1979) [hereinafter "WALKER, BATTERED WOMAN"]; Lenore E. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321 (1992) [hereinafter "Walker, *Self-Defense*"]. In addition, since 1977, she has testified as an expert witness on behalf of battered women in more than 150 murder trials throughout the United States. WALKER, TERRIFYING LOVE, *supra* at 7.

defense.[47]

Other advocates of battered women describe similar accounts of women who steal to support their families and their abusers,[48] or who commit violent offenses in the company or in fear of their batterers.[49]

Public awareness concerning domestic violence continues to increase. Courts and legislatures increasingly recognize the relevance of the battered woman syndrome in cases of self-defense.[50] Abused offenders increasingly appear to draw understanding, sympathy, and, indeed, acquittals from juries across the country.[51] Given the epidemic proportions of domestic

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[47] WALKER, *supra* note 25, at 142.

[48] *See* Fitzsimmons, *supra* note 16 (director of Family Violence Project compares battered women to "hostages" who "do whatever their abusers demand, all the while fearing another beating or death").

[49] *See* Kahler, *supra* note 7 (clinical psychologist/professor explains power and control exerted by batterers in cases of "particularly heinous crimes against non-family members," in which batterers "seem to have an unusual hold over [battered women]").

[50] *See* Robert Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1 U. ILL. L. REV. 45, 59 (1994) (stating that "courts and commentators have accepted [battered woman] syndrome testimony as well-established"). *See also infra* notes 263–70 and accompanying text (discussing legislative recognition of the battered woman syndrome).

[51] Walker, *Self-Defense*, *supra* note 46, at 334. Commentators, legal and otherwise, have begun to write extensively about the perceived acceptance of what some have derogatorily designated the "abuse excuse" in criminal defense work. *See, e.g.*, ALAN M. DERSHOWITZ, THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES AND EVASIONS OF RESPONSIBILITY (1994); James H. Andrews, *I May Be a Murderer, But It's Not My Fault*, CHRIST. SCI. MON., Sept. 19, 1994, at 13; Gail Diane Cox, *Abuse Excuse: Success Grows*, NAT'L L.J., May 9, 1994; at A1, A26; Jan Crawford, *Stretching the Abuse Defense; Bobbitt, Menendez Trials Push Limits*, ARIZ. REP., Jan. 23, 1994, at A1; Michael Fumento, *From Battered Wives to Battered Justice Syndrome*, WASH. TIMES, Jan. 8, 1995, at B3; Stephanie Goldberg, *Faultlines*, ABA J., June 1994, at 40; Julie Irwin & Susan Kuczka: *A Defense That Could Be Abused: Battered Woman Syndrome Isn't an Open-Shut Case*, CHI. TRIB., May 14, 1994, at A1; Wendy Kaminer, *Can Someone Be a Victim and Still Be Guilty?*, S. F. EXAM., Jan. 23, 1994, at D1; Niko Price, *The "Abuse Excuse": Threat to Justice?; More and More Lawyers Using Traumas as Defense to Crimes*, LEGAL INTELLIGENCER, May 31, 1994 at 3.

Other commentators, however, believe the excessive media attention paid to acquittals in high-profile cases skews public perception and obscures the fact that only a very small percentage of battered women actually win acquittals through use of the battered woman syndrome. Instead, such testimony more likely results in conviction for a lesser offense. *See infra* note 97.

violence in this country, the escalating arrest and imprisonment rates for women, and the growing recognition that many female offenders are themselves victims who committed their crimes under the domination, if not coercion, of a male intimate, an increasing number of battered offenders will likely attempt to fit their criminal conduct into the legal excuse of duress. The remaining sections of this Article explore the propriety and ramifications of this anticipated defense strategy.

III. THE "BATTERED WOMAN DEFENSE" AND SELF DEFENSE

Expert testimony concerning the battered woman syndrome centers prominently in a battered woman's claim of duress. To appreciate the relevance of such testimony in cases of duress, however, one must understand the purpose it has previously served (and still serves) in buttressing claims of self-defense. Indeed, because most of the cases and scholarship in this area concern battered women's self-defense claims,[52]

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[52] *See, e.g.*, CHARLES PATRICK EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION (1987); Bannister, *supra* note 34; Blackman, *supra* note 35; Hugh Breyer, *The Battered Woman Syndrome and the Admissibility of Expert Testimony*, 28 CRIM. L. BULL. 99 (1992); Chesler, *supra* note 37; Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121 (1985); *Developments*, *supra* note 34; Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense": Towards a New Understanding*, 19 FORDHAM URB. L.J. 567 (1992); Pamela Jenkins & Barbara Davidson, *Battered Women in the Criminal Justice System: An Analysis of Gender Stereotypes*, 8 BEHAV. SCI. & L. 161 (1990); Ailene Kristal, *You've Come a Long Way, Baby: The Battered Woman Syndrome Revisited*, 9 N.Y.L. SCH. J. HUM. RTS. 111 (1991); Laurence S. Lustberg & John V. Jacobi, *The Battered Woman as Reasonable Person: A Critique of the Appellate Division Decision in* State v. McClain, 22 SETON HALL L. REV. 365 (1992); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PENN. L. REV. 379 (1991); Mahoney, *supra* note 34; Mather, *supra* note 34; Susan Murphy, *Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome*, 25 COLUM. J.L. & SOC. PROBS. 277 (1992); Cathryn J. Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11 (1986); Richard Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986) [hereinafter "Schneider, *Describing*"]; Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623 (1980) [hereinafter "Schneider, *Equal Rights*"]; Schopp, *supra* note 50; Roberta K. Thyfault, *Self-Defense: Battered Woman*

battered offenders who assert duress draw heavily upon the acceptance and use of the battered woman defense in this other context. After describing the syndrome, then, this section will briefly examine the role it currently plays in cases of self-defense.

A. *Battered Woman Syndrome Defined*

The battered woman syndrome, a term originated by Dr. Lenore Walker,[53] describes a pattern of behavioral and psychological characteristics commonly (although not universally)[54] exhibited by battered women who have suffered severe physical and psychological domestic abuse over an extended period of time.[55] According to Walker, a three-

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Syndrome on Trial, 20 CAL. W. L. REV. 485 (1984).

[53] While widely perceived as a leading expert on domestic violence, Walker and her psychological theories are not without their critics. *See, e.g.*, Coughlin, *supra* note 24, at 70–87 (criticizing Walker's studies as biased); David L. Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 630–43 (1986) (viewing Walker's cycle theory as suffering from significant "methodological and interpretive flaws" and her application of learned helplessness inadequate to account "for the actual behavior of many women who remain in battering relationships"); Schopp, *supra* note 50, at 53–64 (critiquing both Walker's conclusions and her underlying research and concluding that "[n]either Walker's data nor [other relevant] later studies sufficiently support the battered woman syndrome as a pattern regularly produced by battering relationships"); Stephen J. Schulhofer, *The Gender Question in Criminal Law*, *in* CRIME, CULPABILITY, AND REMEDY, 106, 117, 120–22 (Ellen Frankel Paul et al., eds., 1990) (criticizing Walker's definition of "battered woman" as overly broad and her theories concerning the cycle of violence and learned helplessness as empirically shaky).

[54] Dr. Walker acknowledges that not all women in abusive relationships suffer from the battered woman syndrome. See Walker, *Self-Defense*, *supra* note 46, at 330. As recognized by the court in McMaugh v. State, 612 A.2d 725 (R.I. 1992), "the existence of this list of traits does not mean that all battered women look and act the same. Although some battered women may have some of or all of these characteristics, it is entirely possible for a battered woman not to evidence any of these characteristics." *Id.* at 731.

[55] United States v. Johnson, 956 F.2d 894, 899 (9th Cir. 1992); People v. Romero, 13 Cal. Rptr. 2d 332, 335 (Cal. Ct. App. 1992), *vacated on other grounds*, 883 P.2d 388 (Cal. 1994); State v. Kelly, 478 A.2d 364, 371 (N.J. 1984); *McMaugh*, 612 A.2d at 731. Walker herself defines the battered woman syndrome as "the measurable psychological changes that occur after exposure to repeated abuse." Walker, *Self-Defense*, *supra* note 46, at 326; *cf.* Mary Ann Douglas, *The Battered Woman Syndrome*, *in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 39–40 (Daniel Jay Sonkin ed., 1987) (defining

phased "cycle of violence" generally characterizes battering relationships.[56] The first phase, which Walker terms the "tension-building phase," consists of relatively minor incidents of abuse, after which the woman attempts to calm the batterer in order to prevent an increase or repetition of the violence.[57] The woman's attempts to placate the abuser eventually become less and less effective, the tension continues to mount, and the psychological and physical abuse intensifies.[58] Phase two of this cycle occurs when the violence ultimately explodes in an "acute battering incident," distinguished from the abuse in phase one by its intensity and brutality.[59] A period that Walker describes as "tranquil, loving (or at least nonviolent)" generally follows the acute battering incident.[60] In this phase of "loving contrition" and relative calm, the batterer will often profess his love for the woman and seek her forgiveness by promising to change his abusive ways.[61] Though phase three may persist for some period of time, the cycle of violence will eventually begin anew.[62]

"battered woman syndrome" as a "collection of specific characteristics and effects of abuse on the battered woman" and a "battered woman" as "any woman who has been the victim of physical, sexual, and/or psychological abuse by her partner").

Other experts on domestic violence criticize these current definitions of the battered woman syndrome. Mary Ann Dutton, for example, seeks to re-define the syndrome because the experiences of battered women encompass "more than their psychological reactions to domestic violence," and because "the psychological profiles of battered women are not limited to one particular profile." Dutton, *supra* note 33, at 1195–96. According to Dutton,

> [a]ll women exposed to violence and abuse in their intimate relationships do not respond similarly, contradicting the mistaken assumption that there exists a singular "battered woman profile." Like other trauma victims, battered women differ in the type and severity of their psychological reactions to violence and abuse as well as in their strategies for responding to violence and abuse.

Id. at 1232.

[56] WALKER, TERRIFYING LOVE, *supra* note 46, at 42; Walker, *Self-Defense*, *supra* note 46, at 330. *But see* Dutton, *supra* note 33, at 1208 (contending that not all domestic violence follows a cycle).

[57] WALKER, TERRIFYING LOVE, *supra* note 46, at 42–43.

[58] *Id.* at 43.

[59] *Id.* at 43–44.

[60] *Id.* at 42.

[61] *Id.* at 44–45.

[62] *See id.* at 46.

As the cycle of violence repeats itself over and over again,[63] the woman finds herself reduced to a state of "learned helplessness."[64] To the battered woman, her abuser's violence appears random, unpredictable, and most importantly, uncontrollable.[65] As the woman "learns" that she is "helpless" to prevent the cycle from recurring or to predict the consequences of her own actions, she becomes "psychologically trapped" and unable to leave the violent battering relationship.[66] As Walker explains: "[b]attered women don't attempt to leave the battering situation even when it may seem to outsiders that escape is possible, because they cannot predict their own safety; they believe that nothing they or anyone else does will alter their terrible circumstances."[67]

B. *Battered Woman Syndrome and Self-Defense*

The battered woman syndrome, particularly its three-phase cycle of violence and the condition of learned helplessness, plays a significant role in the self-defense strategies of many battered women who kill their abusive partners. Indeed, testimony concerning the syndrome often assumes critical importance in overcoming the obstacles that battered

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[63] Under Walker's theory, a woman must undergo the cycle of violence at least twice to qualify as a "battered woman." WALKER, BATTERED WOMAN, *supra* note 46, at xv ("Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman."). The only way to end the cycle of violence, according to Walker, is to "end the relationship altogether." WALKER, TERRIFYING LOVE, *supra* note 46, at 42.

[64] WALKER, TERRIFYING LOVE, *supra* note 46, at 50–51.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 50. Walker derived her theory of learned helplessness from electric shock experiments conducted on dogs by psychologist Martin Seligman. Seligman randomly administered electric shocks to caged dogs. Eventually, the dogs learned that there was nothing that they could do to prevent the shocks and, instead of further attempting escape, developed coping strategies. Walker asserts that battered women likewise develop coping or survival skills at the expense of their ability to escape. *Id.* at 49–51; WALKER, *supra* note 25, at 33, 86–87. *See also* United States v. Johnson, 956 F.2d 894, 899 (9th Cir. 1992) (viewing "learned helplessness" as a "survival skill," rather than as a "sign of passivity or weakness"); Lustberg & Jacobi, *supra* note 52, at 380 & n.76 (characterizing battered woman syndrome as a "survival mechanism" instead of a personal pathology). *But see* Schopp, *supra* note 50, at 64 (contending that existing data "provides neither any clear conception of learned helplessness nor any good reason to believe that it regularly occurs in battered women").

women encounter in asserting self-defense.

1. *The Law of Self-Defense in a Nutshell*

Self-defense generally consists of both subjective and objective components.[68] To assert self-defense in a homicide prosecution, a defendant must produce evidence[69] that she honestly (*i.e.*, subjectively) believed that the use of deadly force was necessary to avert imminent death or serious bodily injury.[70] An actual belief, however, while necessary to self-defense,[71] usually will not alone suffice; a defendant's belief in the necessity of deadly force must also be objectively reasonable.[72] The

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[68] A number of jurisdictions in this country have, in large part, codified the common law delineation of self-defense. For a comprehensive discussion of self-defense, both under the common law, and as modified by the Model Penal Code, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, 191–213 (1987).

[69] While jurisdictions may differ in allocating the ultimate burden of persuasion on self-defense, the defendant generally bears the burden of production. That is, an accused must produce sufficient evidence to establish a prima facie case of self-defense in order to merit presentation of that defense to the jury. *See* MODEL PENAL CODE § 1.12(2) (1985) (prosecutor need not disprove affirmative defense "unless and until there is evidence supporting such defense").

[70] WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, § 5.7(d), at 458 (2d ed. 1986).

[71] Even jurisdictions that dispense with the objective "reasonableness" requirement of self-defense retain this prerequisite of subjective belief in the need for self-defense. *See, e.g.*, MODEL PENAL CODE § 3.04 (1985) ("[T]he use of force upon or toward another person is justifiable *when the actor believes* that such force is immediately necessary for the purpose of protecting himself . . . .") (emphasis added). In contrast, some scholars like Professor Paul Robinson regard an actor's subjective intent as irrelevant to justifications like self-defense when the objective criteria of such defenses are satisfied. For Robinson, justifications focus on the *act*, rather than the *actor*, and thus "should remain available in every situation for which no resulting harm can be demonstrated, regardless of any actor-oriented considerations such as prior fault, motive, belief, or knowledge." Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A. L. REV. 266, 291 (1975). *But see* George P. Fletcher, *The Right Deed For the Wrong Reason: A Reply to Mr. Robinson*, 23 U.C.L.A. L. REV. 293, 321 (1975) (advocating that self-defense be treated "as a case in which a meritorious intent should be required").

[72] This traditional formulation contrasts with that in the minority of jurisdictions adopting the Model Penal Code definition of self-defense. Under the Model Penal Code, if an accused honestly believes that it is necessary to use deadly force, she can assert self-defense, even if her belief is unreasonable. *See* MODEL PENAL CODE § 3.04

satisfaction of both the subjective and objective elements of traditional self-defense[73] will completely exonerate a defendant of all criminal liability for a homicide.[74]

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2. *Self-Defense Obstacles*

Reported cases in which battered women contend that they killed their batterers in self-defense typically involve one of two recurring fact situations: the battered woman kills her abuser either (1) in the course of his violent attack;[75] or (2) during a pause in the violence when he is sleeping or otherwise non-threatening.[76] Today, little controversy surrounds the admission of expert testimony concerning the battered woman syndrome in the first category of cases.[77] Because these traditional

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(1985). At most, she can be convicted of negligent or reckless homicide. *See* MODEL PENAL CODE § 3.09 (1985).

[73] In virtually all jurisdictions, a defendant will lose the benefit of self-defense if found to be the "aggressor" in the deadly confrontation. This additional prerequisite, dubbed the "forfeiture rule," demands that "a person claiming self-defense be free from fault in bringing on the difficulty." Given that most jurisdictions do not require retreat, *see infra* note 91, this forfeiture rule "serves primarily to impose a duty of desistance and retreat on the person who initiates the fight." MODEL PENAL CODE § 3.04(2)(b)(i) cmt. 4(b), at 49–52 (1985). To some, the forfeiture rule rests on an "innocents preferred" principle that entitles "the non-aggressor in the encounter . . . to violate the 'killing is bad' principle." David McCord & Sandra K. Lyons, *Moral Reasoning and the Criminal Law: The Example of Self-Defense*, 30 AM. CRIM. L. REV. 97, 130–31 (1992). This "innocents preferred" principle aids in evaluating the conflicting moral claims invoked when battered offenders assert duress. *See infra* notes 352–68 and accompanying text.

[74] In a further minority of jurisdictions, an honest, but unreasonable belief in the need to use deadly force will mitigate an offense from murder to manslaughter. DRESSLER, *supra* note 68, at 199.

[75] *See, e.g.*, State v. Hundley, 693 P.2d 475 (Kan. 1985); State v. Kelly, 478 A.2d 364 (N.J. 1984).

[76] *See, e.g.*, State v. Stewart, 763 P.2d 572 (Kan. 1988); State v. Norman, 378 S.E.2d 8 (N.C. 1989); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983).

Even rarer are those "non-traditional" cases in which a battered woman requests a third person to kill her abuser on her behalf. *See, e.g.*, People v. Yaklich, 833 P.2d 758 (Colo. Ct. App. 1991); Commonwealth v. Grimshaw, 590 N.E.2d 681 (Mass. 1992); State v. Anderson, 785 S.W.2d 596 (Mo. Ct. App. 1990), *denial of habeas corpus aff'd sub nom.* Anderson v. Gorke, 44 F.3d 675 (8th Cir. 1995); State v. Martin, 666 S.W.2d 895 (Mo. Ct. App. 1984); State v. Leaphart, 673 S.W.2d 870 (Tenn. Crim. App. 1983).

[77] At one time, courts and commentators disputed whether the theories underlying

confrontation cases fit easily into the self-defense mold, courts readily admit lay testimony concerning prior battering, as well as expert testimony regarding the psychological and behavioral effects of that abuse.[78] In the latter category of non-confrontational cases, in contrast, courts and commentators widely disagree concerning whether the facts even justify a jury instruction on self-defense.[79] The criteria of imminence, necessity, and objective reasonableness make these apparently non-confrontational cases difficult to fit within traditional self-defense doctrine.

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the battered woman syndrome had achieved sufficient acceptance in the appropriate scientific community to constitute admissible expert testimony. *See* Breyer, *supra* note 52, at 103–13; Lustberg & Jacobi, *supra* note 52, at 381–87; Mather, *supra* note 34, at 574–87; Murphy, *supra* note 52, at 283–87. Today, courts uniformly regard the battered woman syndrome as generally accepted scientific evidence, and, subject to case-specific relevance and expert qualifications, admissible in support of self-defense. *See* State v. Rogers, 616 So. 2d 1098, 1100 (Fla. Dist. Ct. App.), *approved in part and quashed in part on other grounds*, 630 So. 2d 177 (Fla. 1993) ("[E]xpert testimony relating to the [battered woman] syndrome is henceforth admissible . . . [without any necessity for] a case-by-case determination that the scientific knowledge regarding the syndrome is sufficiently developed to permit a reasonable opinion to be given by an expert."). For citation of cases and commentary reflecting the trend in admitting such evidence, see United States v. Johnson, 956 F.2d 894, 900 (9th Cir. 1992); People v. Romero, 13 Cal. Rptr. 2d 332, 337 n.8 (Cal. Ct. App. 1992), *vacated on other grounds*, 883 P.2d 388 (Cal. 1994); *Rogers*, 616 So. 2d at 1099–1100 nn.2–4.

[78] *See, e.g.*, *Kelly*, 478 A.2d at 372. This uncritical admission of expert syndrome testimony is perplexing even in traditional cases of self-defense, given the law's traditional reluctance to import an accused's psychological characteristics into the objective "reasonableness standard." *See infra* note 200.

[79] A considerable percentage of the legal scholarship in this area concerns the use of self-defense in these non-confrontational cases. Professor Holly Maguigan, however, criticizes as inaccurate the assumption that most battered women kill in non-confrontational situations. *See* Maguigan, *supra* note 52, at 384–85, 397 nn.68–77. Based on her "systematic survey" of existing appellate decisions concerning battered women, Professor Maguigan concludes that over three-quarters of the studied cases involve confrontations "where battered women who kill do so when faced with either an ongoing attack or the imminent threat of death or serious bodily injury . . . ." *Id.* Maguigan attributes most homicide convictions of battered women to procedural rules that preclude such defendants from getting their self-defense claims to the jury, rather than to factual contexts that place those cases outside the traditional framework of self-defense. *Id.* at 458–59.

a. *Imminence*

One of the principal impediments preventing a battered woman from successfully claiming self-defense in a non-confrontational killing is the requirement that the abuser pose an "imminent" threat of death or serious bodily harm to the defendant at the time of his death.[80] "Imminent" traditionally means "immediate"[81] or "such as must be instantly met."[82] The lethal threat must occur contemporaneously with the killing[83] and the defendant must be faced "with an instantaneous choice" between killing or being killed or seriously injured.[84] Traditional self-defense contemplates a one-time encounter that focuses exclusively on the circumstances at or immediately preceding the killing.[85] Future threats of death or grave injury do not present an "imminent" danger,[86] and preemptive strikes based on the decedent's violent reputation, a history of prior abuse, or a prediction of future violence, are strictly prohibited.[87] "Imminence" can thus pose significant obstacles to battered women who kill their batterers in non-confrontational situations.[88]

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[80] A majority of jurisdictions in this country retain this requirement of temporal proximity. *See* MODEL PENAL CODE § 3.04 cmt. 2(c), at 40 & nn.15–16 (1985); *cf.* MODEL PENAL CODE § 3.04(1) (1985) (requiring that deadly force be "immediately necessary").

[81] DRESSLER, *supra* note 68, at 198.

[82] State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989) (citing BLACK'S LAW DICTIONARY 676 (5th ed. 1979)).

[83] People v. Yaklich, 833 P.2d 758, 760 (Colo. Ct. App. 1991); State v. Stewart, 763 P.2d 572, 579 (Kan. 1988).

[84] *Norman*, 378 S.E.2d at 13.

[85] Schneider, *Equal Rights*, *supra* note 52, at 634–35; Schulhofer, *supra* note 53, at 127.

[86] DRESSLER, *supra* note 68, at 198.

[87] *Norman*, 378 S.E.2d at 15 (rejecting the court of appeals relaxed definition of 'imminent' threat as resting "upon purely subjective speculation that the decedent probably would present a threat to life at a future time and that the defendant would not be able to avoid the predicted threat").

[88] Many courts refuse to even instruct the jury on self-defense in such cases. *See, e.g.*, People v. Aris, 264 Cal. Rptr. 167, 172 (Cal. Ct. App. 1989) (no self-defense instruction because battered woman did not face immediate threat from sleeping husband); State v. Stewart, 763 P.2d 572, 574 (Kan. 1988) (trial court erred in instructing jury on self-defense in case where battered woman killed sleeping husband); *Norman*, 378 S.E.2d at 13 (improper to instruct a jury on perfect or imperfect self-defense when battered woman killed sleeping husband); Commonwealth v. Grove, 526 A.2d 369, 372 (Pa. Super. Ct.), *appeal denied*, 517 A.2d 810 (Pa. 1987) (battered woman not entitled to self-defense instruction because no immediate

b. *Necessity*

"Imminence" closely relates to the separate prerequisite "necessity."[89] A defendant can use deadly force only if she reasonably believes that such force is "necessary" to avoid imminent unlawful lethal harm.[90] If she has a reasonable opportunity to safely avoid killing, the homicide is not justified because it is "unnecessary."[91] To many courts, the lack of an "imminent" threat in non-confrontational cases gives a battered woman "ample time and opportunity to resort to other means of preventing further abuse by her husband."[92] Even in more traditional confrontation cases, a fact-finder might find a killing unnecessary under the assumption that the battered woman could earlier have left the abusive relationship or sought the assistance of police or a women's shelter.[93]

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threat from her sleeping husband). *But see* State v. Leidholm, 334 N.W.2d 811, 819 (N.D. 1983) (self-defense allowed where battered woman stabbed sleeping husband); State v. Gallegos, 719 P.2d 1268, 1273 (N.M. Ct. App. 1986) (permitting self-defense claim of battered woman who killed abuser while he lay on his bed); State v. Allery, 682 P.2d 312, 315 (Wash. 1984) (permitting battered woman who killed abuser while he lay on couch exhibiting no immediate violence to assert self-defense).

[89] *See* 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES, § 131(b)(3), at 76–77 (1984 & Supp. 1995) (viewing imminence as "more properly a modification of the necessity requirement"). Some courts view any relaxation of the imminence requirement as threatening the "requirement of real or apparent necessity to justify homicide." State v. Norman, 378 S.E.2d 8, 15 (N.C. 1989).

[90] A defendant who utilizes deadly force to avoid a non-deadly threat generally cannot assert self-defense. This "proportionality component" of self-defense, *see* DRESSLER, *supra* note 68, at 191–92, may present difficulties to a battered woman who kills her abuser with a deadly weapon in response to his physical assault with hands or fists. *See, e.g.*, *Norman*, 378 S.E.2d at 15 (finding "no evidence that [sleeping] husband had ever inflicted life threatening injury").

[91] *See* DRESSLER, *supra* note 68, at 191–92. Courts do not so strictly construe the necessity requirement, however, as to require that a non-aggressor retreat in the face of an imminent deadly threat. The majority of jurisdictions in this country permit a defendant to use deadly force to avert such a threat, even if she knows that she can retreat in complete safety. *Id.* at 196–97; *cf.* MODEL PENAL CODE § 3.04(2)(ii) (1985) (imposing limited duty of withdrawal if defendant is aware that he can avoid using deadly force "with complete safety by retreating").

[92] *Norman*, 378 S.E.2d at 13.

[93] Indeed, both the "necessity" and "imminence" requirements encourage appeal for outside assistance by limiting self-defense to situations where "absolutely no other alternatives" exist and "there is no time to seek outside help." C.J. Rosen, *supra* note 52, at 53.

c. *Objective Reasonableness*

A defendant's honest belief in the imminence of danger and the necessity of deadly force must also be "reasonable." In most jurisdictions, the jury assesses whether a reasonable person, in the "situation" of the defendant, would have similarly perceived an imminent deadly threat and the need to combat it using deadly force.[94]

Jurors in self-defense cases involving battered women often find it difficult to put themselves in the "situation" of the accused. Studies indicate that most jurors adhere to various "myths," "misconceptions," and "stereotypes" concerning domestic violence and women who remain in abusive relationships.[95] The prosecution will typically exploit these misconceptions to attack the defendant's credibility, as well as to question the reasonableness of her perception of imminence and necessity.[96] Unless disabused of these misconceptions, jurors will likely find the battered woman's conduct "unreasonable" and dismiss her self-defense claim.[97]

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[94] *See* Crocker, *supra* note 52, at 125; *Developments*, *supra* note 34, at 1580; Maguigan, *supra* note 52, at 409 & nn.105-06; Schneider, *Describing*, *supra* note 52, at 219; *cf.* MODEL PENAL CODE § 2.20(d) (1985) (evaluating conduct of "reasonable person" from the vantage of "the actor's situation").

[95] As recognized by one court: "Some popular misconceptions about battered women include the beliefs that they are masochistic and actually enjoy their beatings, that they purposely provoke their husbands into violent behavior, and, most critically, . . . that women who remain in battering relationships are free to leave their abusers at any time." State v. Kelly, 478 A.2d 364, 370 (N.J. 1984).

Scholars disagree concerning the prevalence of these misconceptions. *Compare* Jenkins & Davidson, *supra* note 52, at 161 (finding that "[m]yths and stereotypes about women and battered women play a prominent role in the courtroom presentation of both defense and prosecution cases") *with Developments*, *supra* note 34, at 1584 n.66 (questioning inconclusive empirical studies concerning whether jurors overwhelmingly endorse myths and misconceptions regarding domestic violence).

[96] *See* People v. Romero, 13 Cal. Rptr. 2d 332, 338 (Cal. Ct. App. 1992), *vacated on other grounds*, 883 P.2d 388 (Cal. 1994); *Kelly*, 478 A.2d at 377-78.

[97] The impact of the battered woman defense in women's self-defense work is as yet unclear. *Developments*, *supra* note 34, at 1588. The conviction rate for battered women, however, appears much higher in cases in which courts exclude testimony concerning the battered woman syndrome, than in those where this evidence reaches the jury. *See Romero*, 13 Cal. Rptr. 2d at 342 (differing conviction rates make exclusion of expert testimony prejudicial). *Compare* EWING, *supra* note 52, at 96 (indicating that even when expert testimony is admitted, "battered women homicide defendants are still convicted of murder or manslaughter") *with* Walker, *Self-Defense*, *supra* note 46, at 322 (contending that battered woman defense results in "many not

3. *Circumventing the Obstacles*

The battered woman defense assists battered women in overcoming the foregoing obstacles presented by traditional self-defense doctrine. It aims, in particular, at establishing both the subjective and the objective components of that defense.[98]

a. *Credibility/Subjective Belief*

On the most basic level, expert testimony concerning domestic abuse and its behavioral and psychological effects bolsters the credibility of a battered woman's claim that she believed it necessary to use lethal force to combat an imminent deadly threat.[99] While lay testimony concerning a batterer's violent reputation and prior abuse assists in establishing this subjective belief, expert testimony further explains how that long-term, severe abuse can psychologically impact a battered woman's perceptions.[100] The battered woman defense, in other words, helps to

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guilty jury verdicts or convictions of a lesser crime than first degree murder").

[98] *See, e.g., Kelly*, 478 A.2d at 375–77 (expert testimony concerning the battered woman syndrome relevant to defendant's state of mind and the reasonableness of her "belief that she was in imminent danger of death or serious injury").

[99] *See id. at* 375 (battered woman's credibility "critical" to her self-defense claim); *see also* Murphy, *supra* note 52, at 293, 298, 312; Walker, *Self-Defense*, *supra* note 46, at 323–24. Generally, this expert testimony will focus on the cyclical nature of a battering relationship, the specific psychological phenomenon of learned helplessness, the social and economic impediments that prevent the battered woman from leaving a relationship, and the very real physical dangers women face in separating from abusive relationships. As explained by the New Jersey Supreme Court: "Only by understanding these unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman's state of mind be accurately and fairly understood." *Kelly*, 478 A.2d at 372.

[100] Prior abuse, according to experts, makes battered women "hyper-vigilant" to cues of increasing violence and thus able to predict the onset of an impending deadly attack earlier and more accurately than one who has not suffered similar violence. Walker, *Self-Defense*, *supra* note 46, at 324; *see also* ROBINSON, *supra* note 89, at § 184(e)(3), at 412 n.48 (noting that battered "women's knowledge of their 'captors' make them best able to assess the severity of the threat"). *But see* Schopp, *supra* note 50, at 73 (attributing battered woman's hyper-acuity to "ordinary process of inductive inference from past behavior in similar circumstances," rather than to any special capacity generated by battered woman syndrome).

establish that a battered woman honestly believed that a preemptive, fatal strike was the only way to finally and effectively thwart her abuser's certain, impending attack.[101]

b. *Objective Reasonableness—Modification of Traditional Elements*

The battered woman defense also aids in establishing that a reasonable person in the defendant's situation would likewise have perceived an imminent and inescapable deadly threat posed by an apparently non-threatening batterer.

i. *Expanding Imminence and Necessity*

At a minimum, syndrome evidence persuades many courts to expand "imminence" beyond immediacy in order to capture "the build-up of terror and fear . . . systematically created over a long period of time" in battering relationships.[102] The battered woman defense might also persuade a court to stretch "imminence" beyond its inherent temporal borders. Experts in

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[101] *See* Walker, *Self-Defense*, *supra* note 46, at 324 (battered women "may make a preemptive strike before the abuser has actually inflicted much physical damage, anticipating his next moves from what they know from previous experience").

[102] State v. Hundley, 693 P.2d 475, 479 (Kan. 1985). A jurisdiction's definition of "imminence" often impacts the admissibility of battered woman syndrome testimony, as well as the submission of a self-defense instruction. *See* People v. Yaklich, 833 P.2d 758, 762 (Colo. Ct. App. 1991); Maguigan, *supra* note 52, at 415. Unless courts broaden "imminence" to mean "impending," "likely to occur," or "about to happen," a jury will likely focus exclusively on the circumstances immediately preceding the killing and ignore the facts and circumstances known to the battered woman substantially before the killing. *See* Blackman, *supra* note 35, at 128 (narrow reading of "imminence" contrary to elaborate knowledge held by the defendant of what is likely to happen); Maguigan, *supra* note 52, at 449–50 (jury instruction on "imminence" should not restrict jury's attention to "'immediate' circumstances of the killing," but instead "should specifically direct the jury to consider the history between the defendant and the decedent, the decedent's history of other violence, and expert testimony introduced on the effects of the history of abuse"); Schneider, *Equal Rights*, *supra* note 52, at 634–35 ("When the imminent danger rule is interpreted to preclude admission of evidence of the prior relationship and the abuse a woman has suffered, the jury is unable to understand why the woman believed herself to be in danger."); Walker, *Self-Defense*, *supra* note 46, at 324 (whether "imminence" is defined as meaning "on the brink of or about to happen" as opposed to "immediate" makes a "critical" difference in cases of battered woman's self-defense).

these cases, for instance, frequently testify that the learned helplessness experienced by the battered woman, as well as the dangers facing her if she attempts to escape the relationship, make her a virtual prisoner of her controlling batterer.[103] Like the hostage or prisoner of war, the battered woman is said to experience a "single and continuing" "state of siege"[104]

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[103] Courts and commentators frequently analogize the plight of battered women to that of hostages or prisoners of war. Professor Martha Mahoney, for example, draws heavily on this captivity analogy in formulating her theory of "separation assault" to "bridge the difference" between confrontational and non-confrontational cases of self-defense. *See* Mahoney, *supra* note 34, at 87–88. To Mahoney, the battering relationship constitutes a continuing assault on a battered woman's autonomy and her capacity to separate from the abusive relationship. *Id.* at 61–71. The batterer's violent attempts, over time, to control the battered woman and prevent her from leaving, as well as the other "difficulties of exit" confronting a battered woman, make her a virtual captive of the battering relationship. *Id.* at 61–66, 81–82, 87–88; *see also* United States v. Johnson, 956 F.2d 894, 899–900 (9th Cir. 1992) (psychological effects of the battered woman syndrome are similar to effects on hostages or POWs living under "threatening shadow of . . . complete domination"); *Hundley*, 693 P.2d at 479 (battered women are "psychologically similar" to "hostages, brainwashed victims, and POWs"); State v. Norman, 378 S.E.2d 8, 17–18 (N.C. 1989) (Martin, J., dissenting) (comparing battered woman to POW of some years, who has been deprived of her humanity and is held hostage by fear); State v. Stewart, 763 P.2d 572, 584 (Kan. 1988) (Herd, J., dissenting) ("[P]icture a hostage situation where the armed guard inadvertently drops off to sleep and the hostage grabs his gun and shoots him."); EWING, *supra* note 52, at 83–85 (drawing analogy between battered women and other victims of terrorism and/or war); Blackman, *supra* note 35, at 127 (describing battered women as living like "hostages" trapped by physical abuse and psychological change wrought by that abuse); Coughlin, *supra* note 24, at 112 (anatomy of battered woman defense compares battered woman to "distorted mental state of POWs and hostages"); Dowd, *supra* note 52, at 580 (dealing with "imminence" by analogy to hostage told she will be killed the next day); Joan S. Meier, *Notes From the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1319–20 (1993) (emphasizing usefulness of "entrapment" construct).

Others are not persuaded by this analogy between hostages and battered women. Professor Stephen Morse, for example, finds it "a grave moral error implicitly to equate such people—who are being held physically captive and who are fully entitled to kill according to standard self-defense doctrines—to people in psychologically abusing relationships that they entered voluntarily and could leave but for some form of psychological abnormality." Stephen J. Morse, *The Misbegotten Marriage of Soft Psychology and Bad Law*, 14 L. & HUM. BEHAV. 595, 599 (1990)

[104] Dutton, *supra* note 33, at 1208–09. Mary Ann Dutton describes this "state of siege" as follows:

characterized by "constant" or "ever present" terror of death or serious bodily injury.[105] As viewed by one court, the battered woman experiences "no let-up of tension or fear, no moment . . . [of] release[ ] from impending serious harm, even while the decedent [sleeps] . . . [F]rom the perspective of the battered woman, danger is *constantly 'immediate.'*"[106]

ii. *Subjectifying "Reasonableness"*

In theory, the battered woman syndrome "substantiates the reasonableness" of a battered woman's self-defense claim[107] by transforming her into an "every woman"[108]—a rational person normally responding to an abnormal situation.[109] In practice, however, courts and defense attorneys have created a "paradigmatic"[110] battered woman who suffers from a psychological aberration that impairs her capacity to rationally assess or competently respond to an abusive situation.[111] Instead

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> [T]he pattern of violence and abuse can be viewed as a single and continuing entity, one whose character may change over time, but that nevertheless forever changes the nature of the relationship. The battered woman's fear, vigilance, or perception that she has few options may persist, even when long periods of time elapse between physically or sexually violent episodes, and even when the abusive partner appears to be peaceful and calm.

Id.

[105] Mather, *supra* note 34, at 566–68.

[106] *Norman*, 378 S.E.2d at 18 (Martin, J., dissenting) (emphasis added); *see also* Appel, *supra* note 24, at 975 (criticizing courts for failing to "recognize that the threat of serious injury is *always imminent* to a battered woman") (emphasis added). Professor Richard Rosen, who views "imminence" as a "translator" for necessity, criticizes such attempts to jettison the temporal meaning of "imminence." R. Rosen, *supra* note 52, at 375–76, 380, 392, 405–06.

[107] *See* Crocker, *supra* note 52, at 143–44; Schneider, *Describing*, *supra* note 52, at 201–02. Theoretically, by educating the jury about domestic violence, the battered woman syndrome challenges the common misconceptions that may prevent a jury from finding a battered woman's conduct reasonable. *See id.* at 215. It further seeks to characterize the battered woman's psychological and behavioral reactions as coping and survival mechanisms. *See supra* note 67.

[108] *See* Dowd, *supra* note 52, at 574–78.

[109] *See* Blackman, *supra* note 35, at 121; Chesler, *supra* note 37, at 974–75; Dowd, *supra* note 52, at 574–78; Lustberg & Jacobi, *supra* note 52, at 367; Mahoney, *supra* note 34, at 81.

[110] *Developments*, *supra* note 34, at 1593.

[111] The Kansas Supreme Court in *Hundley* voiced this characterization:

of focusing on the external social and economic factors that properly inform the battered defendant's "situation," the battered woman defense currently centers on internal incapacities that render battered women dysfunctional victims, instead of rational survivors.[112] Indeed, the very notion of a "syndrome" connotes "damaged" mental states and psychological deviancy more closely akin to insanity than reasonableness.[113]

> [B]attered women are terror-stricken people whose mental state is distorted and bears a marked resemblance to that of a hostage or a prisoner of war. The horrible beatings they are subjected to brainwash them into believing there is nothing they can do. They live in constant fear of another eruption of violence. *They become disturbed persons from the torture.*

State v. Hundley, 693 P.2d 475, 479 (Kan. 1985) (emphasis added). At least one commentator argues that because battered women, due to a psychological syndrome, assess situations in a manner different from the average person, their self-defense claims should be reclassified as an excuse, rather than as a justification. *See* C.J. Rosen, *supra* note 52, at 43–44; *see also* McCord & Lyons, *supra* note 73, at 157–58 (discussing the reclassification of self-defense in non-confrontation cases); Schopp, *supra* note 50, at 107 (advocating statutory scheme that separates justification defenses based on actual necessity from excuses based on the unreasonable, but nonculpable mistakes produced by the battered woman syndrome).

[112] Feminist scholars are by no means oblivious to this tension between theory and practice in women's self-defense work. Professor Elizabeth Schneider, who extensively practices and writes in this area, repeatedly cautions that the current portrayal of battered women as helpless and impaired victims actually undercuts attempts to depict them as rational and responsible agents. *See* Schneider, *Describing*, *supra* note 52; Schneider, *supra* note 32. Professor Ann Coughlin is even more critical of the battered woman defense and its current emphasis on psychological deviancy. In arguing against its further extension, Coughlin asserts that the battered woman defense assumes that women lack the same capacity for rational self-control as men and subjects women to intrusive social intervention. *See* Coughlin, *supra* note 24, at 5, 7, 50–51. Other scholars voice similar concern over stereotyping battered women as disturbed and dysfunctional. *See, e.g.*, Blackman, *supra* note 35, at 121–22; Chesler, *supra* note 37, at 974–75; *Developments*, *supra* note 34, at 1592–93; Dowd, *supra* note 52, at 577–78, 581; Jenkins & Davidson, *supra* note 52, at 168; Kristal, *supra* note 52, at 152–53; Maguigan, *supra* note 52, at 152–53; Mahoney, *supra* note 34, at 37–42; Schulhofer, *supra* note 53, at 122; Walker, *Self-Defense*, *supra* note 46, at 137, 146, 151–52. The existing formulation of the battered woman defense impacts the propriety of its extension to cases of duress. *See infra* part VI.

[113] *See* Schneider, *Describing*, *supra* note 52, at 199, 207, 211–12. Indeed, battered women unable to claim self-defense often base their defenses on an impaired mental status such as legal insanity, diminished capacity, or heat of passion

Accommodation of battered women within the "reasonable person" benchmark requires even greater individualization of its abstract norm. Besides objectively verifiable physical attributes like sex, age, or weight that may generate a differing perspective of danger, courts must also infuse the standard with the personality traits and psychological profiles that presently personify the "battered woman."[114] Courts are increasingly

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provocation. *See, e.g.*, United States v. Sebresos, No. 91-10193, 1992 U.S. App. LEXIS 17757 (9th Cir. July 22, 1992) (finding battered woman syndrome relevant to diminished capacity defense that negates specific intent); State v. Burton, 464 So. 2d 421 (La. Ct. App.) (attempting to establish insanity plea with evidence of battered woman syndrome), *review denied*, 468 So. 2d 570 (La. 1985); State v. Felton, 329 N.W.2d 161 (Wis. 1983) (holding that failure to investigate either insanity or "heat of passion" manslaughter plea denied battered woman effective assistance of counsel); State v. Hoyt, 128 N.W.2d 645 (Wis. 1964) (finding it appropriate to instruct jury on heat of passion manslaughter in case of battered spouses). These mental status defenses, however, pose particular difficulties for battered women that make them unacceptable alternatives to self-defense.

For example, although the legal formulation of insanity varies from jurisdiction to jurisdiction, all states require that the defendant claiming insanity suffer from a "mental disease or defect." *Compare* MODEL PENAL CODE § 4.01(1) (1985) *with* 18 U.S.C. § 20 (1984). While severe, long-term physical and psychological abuse may well cause diagnosable mental illness and qualify for legal insanity, *see* WALKER, TERRIFYING LOVE, *supra* note 46, at 178, the battered woman syndrome itself does not constitute a mental disease or defect and battered women are not, by definition, mentally ill. *See* United States v. Johnson, 956 F.2d 894, 899 (9th Cir. 1992) (indicating that the battered woman syndrome is not "a gross identifiable mental defect); Neelley v. State, 494 So. 2d 669, 681 (Ala. Crim. App. 1985) (insanity does not encompass "emotional insanity or temporary mania, not associated with a disease of the mind"), *aff'd*, 494 So. 2d 697 (Ala. 1986), *cert denied*, 480 U.S. 926 (1987), *denial of post conviction relief aff'd*, 642 So. 2d 494 (Ala. Crim. App. 1993), *writ quashed as improvidently granted*, 642 So. 2d 510 (Ala. 1994), *cert. denied*, 115 S. Ct. 1316 (1995). *But see* Schopp, *supra* note 50, at 95-96 (concluding that the "battered woman syndrome . . . constitutes a psychological disorder and thus, a mental illness"). Psychologists, instead, classify the syndrome as a sub-category of post-traumatic stress disorder, a set of anxiety-related symptoms that follow "a psychologically distressing event that is outside the range of usual human experience." AM. PSY. ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, § 309.89, at 247-51 (rev. 3d ed. 1987) [hereinafter "DSM-III-R"]; *see also* WALKER, TERRIFYING LOVE, *supra* note 46, at 48 & 48-49 nn.178-79; Walker, *Self-Defense*, *supra* note 46, at 326-27. *But see* Dutton, *supra* note 33, at 1199 & 1225 n.200 (cautioning that some battered women fail to satisfy criteria for PTSD, while others experience clinical reactions not defined by PTSD).

[114] Courts and commentators still struggle to determine which, if any, of a particular defendant's physical and mental attributes to ascribe to this theoretically

willing to so subjectify the standard, whether explicitly through a separate "reasonable battered woman" standard, or implicitly through further elucidation of the battered woman's "situation."[115]

IV. THE "BATTERED WOMAN DEFENSE" AND DURESS

A. *The Battered Woman as Victim of Coercion*

The battered offender would appear the ideal candidate for a criminal excuse based upon duress or coercion. Psychologists frequently define the

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neutral "reasonable person." *See* Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435 (1981). While courts increasingly take an actor's unusual physical characteristics into account, mental or psychological peculiarities generally will not modify the hypothetical standard. Instead, juries typically assess "reasonableness" from the perspective of one of average temperament and disposition. *See* DRESSLER, *supra* note 68, at 102 (reasonable person "lacks unusual physical handicaps" and "possess[es] the intelligence, educational background, level of prudence, and temperament of an average person"); *see also* MODEL PENAL CODE §1.02(2)(d) cmt. 4, at 242 (1985) ("heredity, intelligence or temperament of the actor . . . not material in judging negligence, and could not be without depriving the criterion of all its objectivity").

[115] Feminist scholars like Phyllis Crocker and Elizabeth Schneider argue that a male sex bias permeates the law of self-defense, including its notions of reasonableness. *See* Crocker, *supra* note 52, at 126; Schneider, *Equal Rights*, *supra* note 52, at 647. *But see* Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1431 (1990) (suggesting that "the [self-defense] rules exist not so much to define manly behavior as to limit manly instinct—in order to preserve human life"). Some commentators thus advocate a group based view of reasonableness, such as a "reasonable woman." *See* Crocker, *supra* note 52, at 151–52; Mather, *supra* note 34, at 588. Other commentators press for an entirely separate standard for battered women in particular. *See* Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 419–22 (1988); Mahoney, *supra* note 34, at 89; *see also* State v. Hundley, 693 P.2d 475, 479 (Kan. 1985) ("[T]he objective test is how a reasonably prudent battered wife would perceive [her abuser's] demeanor"); State v. Williams, 787 S.W.2d 308, 312–13 (Mo. Ct. App. 1990) (jury instruction regarding "reasonable battered woman"); State v. Burtzlaff, 493 N.W.2d 1, 7 (S.D. 1992) ("reasonable, prudent battered woman"). Still others reject any specialized standard, whether for battered women in particular or women generally. *See* Maguigan, *supra* note 52, at 443–48 (advocating "generally applicable standard which incorporates a subjective reasonableness analysis"); Schneider, *supra* note 32, at 559–67 (seeking to challenge concept of reasonableness by "bringing to it the wealth of different experiences of both men and women").

"battered woman" in terms of coerced conduct, physical domination, and psychological compulsion. A battered woman, according to Dr. Walker, is one "who has been physically, sexually, or seriously psychologically abused by a man in an intimate relationship, without regard for her rights, *in order to coerce her into doing what he wants her to do* at least two times, often in a specific cycle."[116] Mildred Pagelow similarly defines battered women as

> adult women who were intentionally physically abused in ways that caused pain or injury, or *who were forced into involuntary action or restrained by force from voluntary action by adult men* with whom they have or had established relationships, usually involving sexual intimacy, whether or not within a legally married state.[117]

Indeed, scholars fearful of negatively stereotyping battered women[118] increasingly emphasize coercion as the essence of battering; characterizing the battering relationship as an external "quest" for power and control by the abuser, instead of an internal pathology of the woman.[119] Given the mounting judicial acceptance of battered women's self-defense claims,[120] it is not surprising that an increasing number of battered offenders seek to parlay this vision of battering as coercion into the traditional criminal law defense of duress.

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[116] WALKER, TERRIFYING LOVE, *supra* note 46, at 35 (emphasis added); *see also id.* at 102; WALKER, *supra* note 25, at 202–03; WALKER, BATTERED WOMAN, *supra* note 46, at xv. An "intimate" relationship, according to Walker, is one "having a romantic, affectionate, or sexual component." WALKER, *supra* note 25, at 203.

[117] MILDRED D. PAGELOW, WOMAN BATTERING: VICTIMS AND THEIR EXPERIENCE 33 (1981) (emphasis added).

[118] *See supra* note 112.

[119] *See* Mahoney, *supra* note 34, at 5; *see also* Blackman, *supra* note 35, at 127 (abuser completely controls battered woman by dominating her thoughts, feelings, and actions, and renders battered woman "unable to choose"); Dutton, *supra* note 33, at 1204 & n.59 (emphasizing importance of understanding "dynamic of power and control within an abusive relationship"); Meier, *supra* note 103, at 1317–22 (noting growing emphasis on understanding battering "not as violence, per se, but rather, as a larger pattern of dominance and control"); Schneider, *supra* note 32, at 529, 539 (urging move away from feminist notion of battering as male domination toward a broader definition of battering as "power and control in intimate relationships generally"); *cf.* Joyce McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992) (viewing a battered woman as one coerced through the use or threatened use of force to provide services against her will).

[120] *See supra* note 77.

While the use of the battered woman defense to support duress is a fairly recent phenomenon, the notion of excusing women because of male coercion has common law roots dating back to perhaps the eighth century.[121] The common law doctrine of "marital coercion" granted married women a complete defense to all but a few very serious crimes if the wife acted at the "command" of her husband.[122] Moreover, the mere commission of a crime in the husband's actual or constructive "presence" created a presumption of coercion that the prosecution could rebut only by demonstrating the woman's active and independent participation.[123] Unlike common law duress, which generally required actual coercion or physical overbearing, the doctrine of marital coercion required only a command or request by a husband to his unwilling wife.[124]

Virtually all states have legislatively or judicially abolished the special excuse of marital coercion.[125] Notwithstanding such abolition, however, some scholars view recent efforts to excuse battered women under the

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[121] ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1021 (3d ed. 1982) stating that Blackstone characterized the marital coercion doctrine as one "thousand years old at the time he wrote").

[122] Id. at 1021–22.

[123] *See id.* at 1023; ROBINSON, *supra* note 89, § 177(h), at 371.

[124] While this Article uses the terms "duress" and "coercion" interchangeably, the common law distinguished the two terms. "Coercion" referred to this narrower doctrine of marital coercion available only to married women, while "duress" referred to the broader criminal defense available to both male and female, married and unmarried, offenders. For a discussion of the marital coercion doctrine as an excuse distinct from duress, see LAFAVE & SCOTT, *supra* note 70, § 5.3(f), at 440; PERKINS & BOYCE, *supra* note 121, at 1062, 1018–27; ROBINSON, *supra* note 89, § 177(h), at 371–72; GLANVILLE WILLIAMS, CRIMINAL LAW THE GENERAL PART 762–68 (2d ed. 1961) [hereinafter "WILLIAMS, GENERAL"]; GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 635 (2d ed. 1983) [hereinafter "WILLIAMS, TEXTBOOK"]; Rollin M. Perkins, *Impelled Perpetration Restated*, 33 HASTINGS L. J. 403, 412 (1981).

[125] LAFAVE & SCOTT, *supra* note 70, § 5.3(f), at 440; PERKINS & BOYCE, *supra* note 121, at 1026; ROBINSON, *supra* note 89, § 177(h), at 371–72; *see also* MODEL PENAL CODE § 2.09(3) (1985) ("It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this [duress] Section."). Even in those states that still retain the marital coercion doctrine, the prosecution can easily rebut the presumption of coercion. *See, e.g.*, Matter of Gault, 546 P.2d 639 (Okla. Crim. App. 1976) (stating that the presumption of subjection which arises from coverture is a slight one, rebuttable by circumstances); *see also* LAFAVE & SCOTT, *supra* note 70, § 5.3(f), at 440 & n.55 (explaining that presumption is narrowly construed where maintained); PERKINS & BOYCE, *supra* note 121, at 1026 (where presumption still exists, it is "slight" and so easily rebuttable "as to be of very little practical importance").

banner of duress as marital coercion reincarnated. In her recent article, *Excusing Women*, Professor Ann Coughlin delves deeply into the historical, legal, and social foundations of the marital coercion doctrine.[126] According to Coughlin, the battered woman defense resembles the marital coercion doctrine in that both defenses require that the demanding requirements of duress be "adjusted downward" in order to "accommodate women's predisposition for obedience to men."[127] The remainder of this Article explores whether such a "downward adjustment," if required, is either justified or desirable in light of the nature and underlying rationale of duress itself.

B. *Battered Woman Syndrome and Duress*

As with traditional self-defense, classic duress can pose significant obstacles that may prevent battered women from getting their claims of duress to the jury. As with self-defense, the battered woman defense seeks to surmount those obstacles.

1. *The Law of Duress in a Nutshell*

Whether battered women must stretch or modify the elements of duress as they do for self-defense[128] depends largely on a jurisdiction's specific formulation of that defense.[129] Most of the jurisdictions in this country continue to closely adhere to the traditional common law formulation of duress.[130] As traditionally defined, a prima facie case of duress consists of

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[126] Coughlin, *supra* note 24, at 26–48.

[127] *Id.* at 1–32, 57.

[128] While battered women can generally claim self-defense in traditional "confrontation" cases, they face significant hurdles in less traditional, "non-confrontation" cases. *See supra* notes 75–97 and accompanying text. Similarly, a battered woman should have little difficulty obtaining an instruction on duress or admitting expert testimony in cases that approximate the more traditional "gun to the head" scenario. *But see* United States v. Willis, 38 F.3d 170, 176 (5th Cir. 1994) (viewing expert testimony as irrelevant to duress). As with self-defense, the less traditional cases of duress, in which coercion is not readily apparent, pose the greatest obstacles to battered offenders. *See infra* notes 133–209 and accompanying text. This Article focuses on the extension of duress to encompass these arguably non-coercive cases.

[129] For a discussion of how a jurisdiction's definition of duress impacts the viability of a battered offender's claim of duress, see *infra* notes 211–34 and accompanying text.

[130] The chart in the attached Appendix illustrates jurisdictional differences in the

the following elements: (1) an immediate or imminent threat of death or serious bodily injury unless the defendant commits a criminal offense other than homicide; (2) a well-grounded fear or belief that the threat will be carried out; and (3) an honest and reasonable belief that committing the crime is the only way to avoid the threatened harm.[131] Each of these

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treatment of duress. Most states have codified duress in their penal codes. *See, e.g.*, ALA. CODE § 13A-3-30 (1994); ALASKA STAT. § 11.81.440 (1989) (Michie 1994); ARIZ. REV. STAT. ANN. § 13-412 (1989); ARK. CODE ANN. § 5-2-208 (Michie 1993); CAL. PENAL CODE § 26(6) (West 1988); COLO. REV. STAT. ANN. § 18-1-708 (West 1995); CONN. GEN. STAT. ANN. § 53A-14 (West 1994); DEL. CODE ANN. tit. 11, § 431 (1987); GA. CODE ANN. §§ 16-906 (Michie 1992); HAW. REV. STAT. § 702-231 (1985); IDAHO CODE § 18-201(4) (Michie 1987); ILL. ANN. STAT. ch. 720, Para. 5/7-11 (Smith-Hurd 1993); IND. CODE ANN. § 35-41-3-8 (West 1994); IOWA CODE ANN. § 704.10 (West 1993); KAN. STAT. ANN. § 21-3209 (1988); KY. REV. STAT. ANN. § 501.090 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 14:18(6) (West 1986); ME. REV. STAT. ANN. tit. 17, § 103-A (West 1983); MINN. STAT. ANN. § 609.08 (West 1987); MO. ANN. STAT. § 562.071 (Vernon 1979); MONT. CODE ANN. § 45-2-212 (1993); NEV. REV. STAT. ANN. § 194.010(8) (Michie 1992); N.H. REV. STAT. ANN. § 627:3 (1986); N.J. STAT. ANN. § 2C:2-9 (West 1982); N.Y. PENAL LAW § 40.00 (McKinney 1987); N.D. CENT. CODE § 12.1-05-10 (1985); OKLA. STAT. ANN. tit. 21, § 156 (West 1983); OR. REV. STAT. § 161.270 (1993); PA. STAT. ANN. tit. 18, § 309 (1983); S.D. CODIFIED LAWS ANN. § 22-5-1 (1988); TENN. CODE ANN. § 39-11-504 (1991); TEX. PENAL CODE ANN. § 8.05 (West 1994); UTAH CODE ANN. § 76-2-302 (1995); WASH. REV. CODE ANN. § 9A.16.060 (West 1988); WIS. STAT. ANN. § 939.46 (West 1982). A few jurisdictions continue to treat duress as a creature of common law. *See, e.g.*, Cawthon v. State, 382 So. 2d 796 (Fla. Dist. Ct. App.), *review denied*, 388 So. 2d 1110 (Fla. 1980); State v. Crawford, 521 A.2d 1193 (Md. 1987); Commonwealth v. Robinson, 415 N.E.2d 805 (Mass. 1981); People v. Hubbard, 320 N.W.2d 294 (Mich. Ct. App. 1982); Knight v. State, 601 So. 2d 403 (Miss. 1992); State v. Fuller, 278 N.W.2d 756 (Neb. 1979), *opinion supplemented*, 281 N.W.2d 749 (Neb. 1979); State v. Castrillo, 819 P.2d 1324 (N.M. 1991); State v. Carver, 385 S.E.2d 145 (N.C. 1989); State v. Harr, 610 N.E.2d 1049 (Ohio Ct. App. 1992); Frasier v. State, 410 S.E.2d 572 (S.C. 1991); Sam v. Commonwealth, 411 S.E.2d 832 (Va. Ct. App. 1991); State v. Tanner, 301 S.E.2d 160 (W. Va. 1982); Amin v. State, 811 P.2d 255 (Wyo. 1991). Two states, Rhode Island and Vermont, apparently have no common law or statutory version of duress.

[131] In some jurisdictions, a defendant must additionally demonstrate that she was not at fault for creating or placing herself in the coercive situation. *See infra* APPENDIX. For a general discussion of the defense of duress, see JOHN S. BAKER, ET AL., HALL'S CRIMINAL LAW 562–77 (5th ed. 1993); DRESSLER, *supra* note 68, at 259–273; SANFORD H. KADISH & STEVEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS, 928–47 (5th ed. 1989); LAFAVE & SCOTT, *supra* note 70, § 5.3 at 432–41; PERKINS & BOYCE, *supra* note 121, at 1054–74; ROBINSON, *supra* note 89, § 177, at 347–72; WILLIAMS, GENERAL, *supra* note 124, at 751–69;

elements of traditional duress presents a potential obstacle that may impede battered women from asserting duress as a complete defense to a crime.[132]

2. *Obstacles Posed by Traditional Duress*

a. *Nature of Coercive Threat*

Classic duress restricts the types of coercive threats[133] sufficient to excuse an actor of criminal responsibility. Duress must arise from an unlawful, human threat[134] of personal injury[135] that is likely to result in

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WILLIAMS, TEXTBOOK, *supra* note 124 at 624–36; Michael D. Bayless, *Reconceptualizing Necessity and Duress*, 33 WAYNE L. REV. 1191 (1987); Craig L. Carr, *Duress and Criminal Responsibility*, 10 LAW & PHIL. 161 (1991); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Limits*, 62 S. CAL. L. REV. 1331 (1989); Herbert Fingarette, *Victimization, A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape*, 42 WASH. & LEE L. REV. 65 (1985); Walter H. Hitchler, *Duress as a Defense In Criminal Cases*, 4 VA. L. REV. 519 (1917); Jeremy Horder, *Autonomy, Provocation and Duress*, 1992 CRIM. L. REV. 706 (1992); Lawrence Newman & Lawrence Wetzer, *Duress, Free Will, and the Criminal Law*, 30 S. CAL. L. REV. 313 (1957); Nicola M. Padfield, *Duress, Necessity and the Law Commission*, 1992 CRIM. L. REV. 778; G.L. Peiris, *Duress, Volition, and Criminal Responsibility*, 17 ANGLO-AMERICAN L. REV. 182 (1988); Perkins, *supra* note 124; Peter Rosenthal, *Duress and the Criminal Law*, 32 CRIM. L.Q. 199 (1990) (Canada); Martin Wasik, *Duress and Criminal Responsibility*, 1977 CRIM. L. REV. 453 (1977).

[132] A battered woman unable to establish the elements of "complete" duress sufficient to acquit may usually still urge "incomplete" duress in mitigation of her sentence. *See* United States v. Johnson, 956 F.2d 894, 898 (9th Cir. 1992); United States v. Gaviria, 804 F. Supp. 476, 479 (E.D.N.Y. 1992); Neelley v. State, 494 So. 2d 669, 681 (Ala. Crim. App. 1985), *aff'd*, 494 So. 2d 697 (Ala. 1986), *cert. denied*, 480 U.S. 926 (1987), *denial of post conviction relief aff'd*, 642 So. 2d 494 (Ala. Crim. App. 1993), *writ quashed as improvidently granted*, 642 So. 2d 510 (Ala. 1994), *cert. denied*, 115 S. Ct. 1316 (1995). For a discussion of the use of duress at sentencing, see *infra* notes 271–89 and accompanying text.

[133] Duress limits its excuse to *threats*, which rest on fear of painful consequences, as distinguished from *offers*, which rest on a desire to improve one's circumstances. According to Joshua Dressler, this distinction assumes that actions are more freely motivated by an offer or temptation than by fear of a threat. *See* Dressler, *supra* note 131, at 1337.

[134] Duress will not encompass the coercive effect of natural causes or forces. *See* MODEL PENAL CODE § 2.09 cmt. 3, at 378–79 (1985). Although some commentators describe duress as a "choice of evils" defense similar to necessity, this requirement of a *human* threat distinguishes the two defenses. *See infra* notes 328–31 and accompanying text. Moreover, duress does not encompass *lawful* human threats. *See*

either death or serious bodily harm.[136] Threats of lesser injuries, no matter how minor the offense committed, will not excuse.[137] Duress, as traditionally formulated, thus does not permit any proportionality or "sliding scale" analysis based on the severity of the threat compared to that of the offense committed.[138]

A battered woman who commits an offense in order to avoid further physical abuse from her batterer can likely establish that she acted out of fear of an unlawful human threat to her person.[139] Similar threats

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MODEL PENAL CODE § 2.09 cmt. 3, at 378–79; ROBINSON, *supra* note 89 at § 177(e), at 355–57; WILLIAMS, TEXTBOOK, *supra* note 124, at 634.

[135] Threats concerning property, reputation, or other economic loss, however severe, will not suffice. DRESSLER, *supra* note 68, at 259; WILLIAMS, TEXTBOOK, *supra* note 124, at 634.

[136] Common law duress further required that the mortal threat be aimed at the personal safety of the accused or a close family member. Most jurisdictions today relax this requirement to include threats aimed at the accused "or another." State v. Toscano, 378 A.2d 755, 762 (N.J. 1977) (explaining that "recent decisions have assumed that concern for the well-being of another, particularly a near relative, can support a defense of duress if the other requirements are satisfied"). *See, e.g.*, ALA. CODE § 13A-3-30 (1994) ("himself or another"); CONN. GEN. STAT. ANN. § 53a-14 (West 1994) ("person or third person"). Some states, however, retain the common law restriction requiring that the coercive threat be aimed at the defendant. *See* GA. CODE ANN. § 16-3-26 (1992) ("person of defendant"). Others specify the relationship of the threatened party. *See* KAN. CRIM. CODE ANN. § 21-3209 (Vernon 1994) ("him or upon his spouse, parent, child, brother, or sister").

[137] MODEL PENAL CODE § 2.09 cmt. 3, at 375 (1985); DRESSLER, *supra* note 68, at 259; *Toscano*, 378 A.2d at 762.

[138] Many commentators criticize this lack of proportionality and argue that because some offenses are minor, no minimum level of threat should be required. *See* WILLIAMS, GENERAL, *supra* note 124, at 762; Padfield, *supra* note 131, at 782; Perkins, *supra* note 124, at 416; Rosenthal, *supra* note 131, at 225. Some states do make a limited exception to the "death or serious bodily injury" requirement when the coerced actor commits only a misdemeanor. *See, e.g.*, IND. CODE ANN. § 35-41-3-8 (West 1994) (for non-felonies, force or threat of force suffices for duress); KAN. CRIM. CODE ANN. § 21-3209 (Vernon 1994) (force or threat of force permitted for non-felony). Indeed, Texas would appear to permit a duress defense in non-felony cases involving a mere threat to property. *See* TEX. PENAL CODE ANN. § 8.05 (West 1994) ("In a prosecution for an offense that does not constitute a felony, it is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by force or threat of force."). The Model Penal Code provides for a limited proportionality analysis. *See infra* notes 211–34 and accompanying text.

[139] At one time, unfortunately not so long ago, a battered woman may have had difficulty establishing the "unlawfulness" of such physical abuse. *See* Bannister, *supra*

concerning the woman's children or family, which may well be more coercive to the woman than any danger to herself, will probably also suffice.[140] Unless a batterer uses deadly force or threatens the battered woman with death or mortal injury, however, the battered offender may be denied duress as a matter of law.[141] The long and wasting psychological injury characteristic of many battering relationships[142] does not satisfy this legal threshold and no balancing of the threatened harm against the offense committed ever occurs.[143]

Classic duress also requires that the coercer, either expressly or impliedly, order the commission of the offense committed by the accused.[144] A generalized fear of retaliation, unconnected with any

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note 34, at 317 (battering of wives by husbands previously the societal "norm"); Dowd, *supra* note 52, at 568–74 (acceptance of wife abuse in modern society only recently beginning to change).

[140] *See supra* note 136. *But see* United States v. Santos, 932 F.2d 244, 252 (3d Cir. 1990), *cert. denied*, 502 U.S. 985 (1991) (trial court did not erroneously fail to instruct jury that battered woman could establish duress as a result of threats against her children because "[t]here was no evidence that the threats to her children had a greater or different impact on [the battered woman] than the threats to her own life and health").

[141] *See* United States v. Gaviria, 804 F. Supp. 476, 478–79 (E.D.N.Y. 1992) (abuse of battered offender not severe enough to support duress defense). A majority of jurisdictions in this country continue to limit duress to coercive threats involving death or grievous bodily harm. *See infra* APPENDIX (Alabama, Arizona, California, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

[142] Under most definitions of battering, a battering relationship consists of severe psychological or emotional abuse, as well as physical assault. One domestic violence expert, Charles Ewing, classifies this psychological injury as the defining characteristic of a battered woman. Ewing describes the psychological damage to a battered woman as "a gross and enduring impairment of one's psychological functioning which significantly limits the meaning and value of one's physical existence." *See* EWING, *supra* note 52, at 79; *see also* Jessica Greenwald et al., *Psychological Self-Defense Jury Instructions: Influence on Verdicts for Battered Women Defendants*, 8 BEHAV. SCI. & L. 171, 172 (1990).

[143] *But see* Boland, *supra* note 24, at 626–27 (contending that "seemingly minimal level of threats upon a woman who has been 'beaten down' over a long period of time" justifies admission of expert testimony to aid jury in balancing threats against coerced offense).

[144] As explained by Glanville Williams "the offense must be one expressly or impliedly ordered by the villain, the order being backed up by his threat." WILLIAMS, TEXTBOOK, *supra* note 124, at 633; *see also* ROBINSON, *supra* note 89, § 177(e)(5), at

specific, articulable demand to commit an offense, will not excuse.[145] A battered woman may not be able to demonstrate that her batterer specifically demanded that she commit a particular offense. For instance, battered women are often charged with crimes of omission; for *failing to act* in the face of a legal duty to do so.[146] In such cases, the connection between a batterer's violence and the woman's failure to act may prove insufficient to support a claim of duress. A battered woman's "generalized fear of persecution" by her batterer, absent any specific "threat of immediate retaliation" if she fails to cooperate, generally will not

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361–62; Fingarette, *supra* note 131, at 106.

Professor Paul Robinson finds the language of many duress statutes ambiguous in that it "could also mean that the defendant must believe that he will be endangered if he does not commit the act or make the omission, even if it is not the particular act commanded." ROBINSON, *supra* note 89, § 177(e)(5), at 361 n.33. Robinson notes, however, that many existing duress statutes implicitly require a directed threat. *Id.* at 362 n.33; *see also* United States v. Jordan, 722 F.2d 353 (7th Cir. 1983) (no right to duress instruction absent evidence that alleged coercer demanded that defendant commit the crime with which he was charged); State v. Coats, 835 S.W.2d 430, 435 (Mo. Ct. App. 1992) (duress instruction unwarranted absent evidence that alleged muggers directed defendant to strike victim).

[145] State v. Toscano, 378 A.2d 755, 761 (N.J. 1977); *see also* Dressler, *supra* note 131, at 1384 (law must distinguish between those who act because of a specific, articulable threat and those who commit crime without any such threat).

[146] Authorities increasingly prosecute battered mothers for failing to protect their children from abuse at the hands of a batterer. *See, e.g.*, Joe Lambe, *Dead Child's Mother Enters Guilty Plea: Angela Melton Agrees to Testify at Former Boyfriend's Murder Trial*, KAN. CITY STAR, Dec. 3, 1994, at 1; Dan McGrath, *Abused Mom Still Must Protect Kids*, SACRAMENTO BEE, Sept. 18, 1994, at A2; Rita Price, *Woman Says Fear of Husband Kept Her Silent on Daughter's Rape*, COLUMBUS DISPATCH, May 17, 1993, at 1A; *Woman Convicted in Scalding Death of Four-Year Old Son*, UPI, Sept. 9, 1992; *see also* Schneider, *supra* note 32, at 551–54 (citing case law and legislation holding battered mothers responsible for violence to battered children); Walker, *Self-Defense*, *supra* note 46, at 322 (describing recent use of battered woman syndrome testimony in cases of "murder by omission" where battered women fail to protect their children).

Other battered women face criminal sanction because they fail to report their abusive partner's illegal activities. *See, e.g.*, United States v. Sixty Acres in Etowah County, 930 F.2d 857 (11th Cir. 1991) (battered woman suffered criminal forfeiture because of alleged consent to husband's drug activities); Sloan v. State, No. CA CR 88-35, 1988 WL 70743, (Ark. Ct. App. July 6, 1988) (battered woman convicted of delivery and possession of controlled substance based upon failure to inform authorities of husband's possession); State v. Lambert, 312 S.E.2d 31 (W. Va. 1984) (battered woman charged with welfare fraud for failure to tell welfare authorities of husband's employment).

"substitute . . . for the showing of duress courts have always required to excuse otherwise criminal conduct."[147]

Even with crimes of commission, battered women may act under a very real, but nevertheless "generalized fear of retaliation." In her studies of battered women, for example, Dr. Walker finds that many battered offenders commit their crimes in the shadow of their batterer's actual or threatened violence.[148] Unless a battered woman can connect her offense to an articulable demand from her abuser,[149] however, her claim of duress will likely fail.[150]

b. Nature of Offense

Besides restricting the nature of the coercive threat, traditional duress also limits the types of offenses that qualify for its excuse. Under the

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[147] *Sixty Acres*, 930 F.2d at 860-61. In *Sixty Acres*, the government sought forfeiture of property used by a battered woman's husband to grow marijuana. The woman defended the forfeiture action, arguing that she had never consented to her husband's illegal activities. *Id.* at 859. Although the record amply demonstrated that the woman and her family lived in extreme fear of the batterer, it failed to establish that the man had "threatened immediate retaliation to his wife if she refused to cooperate in the drug scheme which caused his arrest." *Id.* at 861. In rejecting the abused woman's defense of duress, the Eleventh Circuit stated:

> The evidence amply supports the district court's finding that Mr. Ellis' presence induced fear, anxiety and fierce discomfort in the members of his household. Mrs. Ellis' *generalized* fear of persecution from her husband, however, does not allow her to escape the consequences (in this case, forfeiture) of her consent to his illegal acts. We may not substitute, as the district court appeared to do, a vaguely-defined theory of "battered wife syndrome" for the showing of duress courts have always required to excuse otherwise criminal conduct.

Id. at 860.

[148] WALKER, *supra* note 25, at 142.

[149] *Toscano*, 378 A.2d at 761.

[150] *See, e.g.*, United States v. Gaviria, 804 F. Supp. 476, 478-79 (E.D.N.Y. 1992) (abuse of battered woman not "connected directly enough with [her] crime to support a duress defense"); Sloan v. State, No. CA CR 88-35, 1988 WL 70743, at *5 (Ark. Ct. App. July 6, 1988) (no evidence that battered woman acted under "present and immediate danger *with respect to possession of the marijuana*") (emphasis added); People v. Yaklich, 833 P.2d 758, 763 (Colo. Ct. App. 1991) (duress instruction unwarranted because woman did not act "at direction of another person" when she hired another to kill abusive husband).

common law, a defendant accused of murder could not avail herself of the defense of duress, notwithstanding satisfaction of all the other requisites of the defense.[151] Jurists and scholars have long debated the propriety of this "inexcusable choice" restriction on duress.[152] While most contemporary commentators oppose restricting duress based on the nature of the offense committed,[153] the majority of jurisdictions in this country continue to

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[151] MODEL PENAL CODE § 2.09 cmt. 1, at 368 (1985); KADISH & SCHULHOFER, *supra* note 131, at 940; Fingarette, *supra* note 131, at 69; Perkins, *supra* note 124, at 403–08.

[152] *See* George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1278–79 (1974) (exploring common law's reluctance to accept necessity or duress as defenses in homicide cases).

Blackstone regarded murder as a natural offense against God which society, as creator of positive law, could never excuse. 4 WILLIAM BLACKSTONE, COMMENTARIES *27 ("[T]hough a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent."). Scholars who view duress as a "lesser evils" defense argue that one can never take an innocent life in order to avoid death or injury to oneself. *See* LAFAVE & SCOTT, *supra* note 70, § 5.3(a), at 433 (the rationale for duress is that, "for reasons of social policy, it is better that the defendant, faced with the choice of evils, choose to do the lesser evil . . . in order to avoid the greater evil threatened by the other person."); *see also* WILLIAMS, GENERAL, *supra* note 124, at 756 (lesser evils rationale of duress supports murder exception to duress). Still others believe the restriction necessary to prevent duress from becoming a "charter for terrorists," Lynch v. Director of Public Prosecutions for Northern Ireland, 1 All. E.R. 913, 933 (1975) (Lord Simon); Abbott v. The Queen, 3 All. E.R. 140, 146 (1976) (Lord Salmon), or a "cloak" for "the coward." Regina v. Howe, 1 All. E.R. 771, 780 (1987) (Lord Hailsham). *See also* Perkins, *supra* note 124, at 404 ("The criminal law is a moral code and the recognition of an excuse under these circumstances would declare such an intentional killing to be morally acceptable.").

In contrast, those opposed to limiting duress to non-homicide offenses find it hypocritical to demand that an accused exercise a greater degree of courage than that possessed by ordinary persons. *Lynch*, 1 All. E.R. at 918–19 (Lord Morris of Borth-Y-Geft). These scholars view punishment of the coerced killer as ineffective and thus improper because one faced with imminent death simply cannot be deterred from acts of self-preservation. *See* WILLIAMS, GENERAL, *supra* note 124, at 737–38 (quoting THOMAS HOBBES, LEVIATHAN, ch. 27 (1885)).

[153] *See* WILLIAMS, GENERAL, *supra* note 124, at 762 (rejecting absolute ban on duress in homicide cases and advocating, instead, a proportionality analysis that balances "what the accused has done and what harm he was trying to avoid"); Fingarette, *supra* note 131, at 70 (finding murder exclusion to represent situation in which "public policy rides roughshod over both legal analysis and psychological reality"); Padfield, *supra* note 131, at 783–84 (proposing duress as defense to any

exclude duress as a defense to homicide.[154]

In many jurisdictions, then, a battered woman forced to kill a third party under an imminent threat of death or serious bodily harm from her batterer cannot assert duress as a matter of law, no matter how compelling the circumstances or severe the abuse.[155] The homicide exception to duress

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charge).

The Model Penal Code does not limit the types of offenses to which duress might be asserted. *See* MODEL PENAL CODE § 2.09 cmt. 3, at 376 (1985) ("It is obvious that even homicide may sometimes be the product of coercion that is truly irresistible . . . ."). For a discussion of the Model Penal Code formulation of duress and its potential impact on battered offenders, see *infra* notes 211–234 and accompanying text.

[154] Alabama, Georgia, Kansas, Kentucky, Louisiana, Maine, Minnesota, Missouri, New Mexico, Oregon, Washington, and Wisconsin all preclude duress as a defense to a prosecution for murder or intentional killings. Arizona, Nebraska, North Carolina, and South Carolina exclude duress from homicide prosecutions. California, Idaho, Illinois, Montana, and Nevada exclude crimes punishable by death from their duress provisions. Colorado limits duress to crimes other than Class I felonies. Florida precludes duress as a defense to attempted murder charges. Kansas, Washington, and Michigan prohibit duress from being asserted in manslaughter prosecutions. Maryland, West Virginia and Wyoming limit duress to offenses other than those involving the "taking of innocent life." Indiana and Iowa appear to impose the most severe limitation based on the nature of the offense. Indiana prohibits the assertion of duress in a prosecution for an offense "against persons" and Iowa prohibits its assertion in any prosecution involving intentional or reckless physical injury. In total, at least 29 states limit duress to crimes other than murder. *See infra* APPENDIX; *see also* Cawthon v. State, 382 So. 2d 796, 717 (Fla. Dist. Ct. App.), *review denied*, 388 So. 2d 1110 (Fla. 1980); Wentworth v. State, 349 A.2d 421, 426 (Md. Ct. Spec. App. 1975); People v. Moseler, 508 N.W.2d 192, 194 (Mich. Ct. App. 1993); State v. Fuller, 278 N.W.2d 756, 762 (Neb.), *modified on other grounds*, 281 N.W.2d 749 (Neb. 1979); State v. Baca, 845 P.2d 762, 767 (N.M. 1992); State v. Henderson, 307 S.E.2d 846, 849 (N.C. Ct. App. 1983); State v. Robinson, 363 S.E.2d 104 (S.C. 1987); State v. Tanner, 301 S.E.2d 160, 163 (W. Va. 1982); Amin v. State, 811 P.2d 255, 260 (Wyo. 1991).

[155] The case of *Neelley* dramatically illustrates this restriction and its impact on battered offenders. In that case, Judith Neelley raised a "combination of duress . . . the battered woman syndrome . . . and coercive persuasion" in defense to a charge of kidnapping and brutally murdering a 13-year old girl. Neelley v. State, 494 So. 2d 669, 677 (Ala. Crim. App. 1985), *aff'd*, 494 So. 2d 697 (Ala. 1986), *cert. denied*, 480 U.S. 926 (1987), *denial of post conviction relief aff'd*, 642 So. 2d 494 (Ala. Crim. App. 1993), *writ quashed as improvidently granted*, 642 So. 2d 510 (Ala. 1994), *cert. denied*, 115 S. Ct. 1316 (1995). At trial, Neelley presented evidence that her accomplice/husband had subjected her "to such violent and gross mental, emotional, physical, and sexual abuse that she would have done anything, and did do everything

may further prevent a battered woman from claiming duress as a defense to the independent felony underlying a felony-murder charge.[156] Indeed, in some jurisdictions, this restriction on duress may prevent a battered woman from claiming duress in a prosecution for involuntary manslaughter, a crime involving mere recklessness.[157] If a battered woman cannot assert duress in such circumstances, she may be relegated to using evidence of compulsion and the battered woman syndrome to mitigate her crime[158] or her punishment[159] or to support an insanity or diminished capacity

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he asked." *Id.* At a post-trial hearing, Dr. Lenore Walker testified that Neelley "was a severely battered woman, that she was acting out her husband's wishes, and that her criminal acts were committed as a way of coping with that abuse and protecting herself." Neelley v. State, 642 So. 2d 494, 499 (Ala. Crim. App. 1993), *writ quashed as improvidently granted*, 642 So.2d 510, *cert denied*, 115 S. Ct. 1316 (1995). Because Alabama law denied duress as a defense "in a prosecution for murder or any killing of another under aggravated circumstances," however, such prior abuse was ruled relevant only to mitigate punishment. *Neelley*, 494 So. 2d at 681–82.

156 Jurisdictions that prohibit the use of duress in homicide cases differ concerning whether it can excuse one compelled to commit a felony during the course of which a death occurs. *See* KADISH & SCHULHOFER, *supra* note 131, at 941 n.12; *see also* State v. Dunn, 758 P.2d 718, 725 (Kan. 1988) (battered woman permitted to assert duress as a defense to the underlying felony in a felony murder prosecution), *habeas corpus granted sub nom.* Dunn v. Roberts, 758 F. Supp 1442 (D. Kan. 1991), *aff'd*, 963 F.2d 308 (10th Cir. 1992); State v. Bockorny, 863 P.2d 1296, 1298 (Or. Ct. App. 1993) (court assumes, without deciding, that battered woman can assert duress in defense of felonies underlying aggravated murder charge).

157 *See, e.g.*, People v. Moseler, 508 N.W.2d 192, 194 (Mich. Ct. App. 1993), *appeal denied*, 519 N.W.2d 899 (Mich. 1994) (denying duress defense to battered woman involved in fatal traffic accident that occurred as she was being chased by her abusive boyfriend).

158 Several jurisdictions that deny a duress defense in murder prosecutions nevertheless permit coercion to reduce a murder charge to manslaughter. *See, e.g.*, MINN. STAT. ANN. § 609.20(3) (West 1987) (making it first degree manslaughter where, through coercion, a defendant was forced to kill another); WIS. STAT. ANN. § 939.46 (West 1982) (in murder prosecutions, duress will reduce degree of crime to manslaughter).

159 Even if duress cannot be asserted as a complete or even partial defense to murder, most jurisdictions will allow evidence of compulsion to serve as a mitigating factor in sentencing. *See, e.g.*, *Neelley*, 642 So. 2d at 508 (evidence of battered woman syndrome "obviously pertinent and significant on the sentencing decision to be made by the judge"); *Neelley*, 494 So. 2d at 682 ("only legal theory upon which Mrs. Neelley's alleged treatment by her husband was relevant was the one the jury properly considered—mitigation of sentence"); People v. Smith, 608 N.E.2d 1259, 1271 (Ill. App. Ct. 1993) (in sentencing battered woman who pled guilty to murder of her infant child, trial court considered fact that woman suffered from the battered woman

defense.[160]

c. *Temporal Proximity of Threat: Imminent v. Immediate*

Like self-defense, classic duress requires a certain temporal proximity between a coercer's threat and his threatened harm.[161] As with self-defense, jurisdictions differ in their construction of that temporal prerequisite. And as with self-defense, this "element of immediacy"[162] §constitutes a serious roadblock to battered women seeking to assert duress.

A majority of jurisdictions continue to require an "immediate" or "imminent" threat of injury as a threshold element of duress.[163] This

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syndrome and acted under influence of her co-defendant). See *infra* notes 271–89 and accompanying text for a further discussion of the role of duress at sentencing.

[160] Dunn v. Roberts, 963 F.2d 308 (10th Cir. 1992), illustrates the use of coercion to support a claim of diminished capacity. In *Dunn*, a battered woman convicted of aiding and abetting her batterer in felony-murder and aggravated kidnapping failed at trial to establish a prima facie case of duress. State v. Dunn, 758 P.2d 718, 725–27 (Kan. 1988), *habeas corpus granted sub nom.* Dunn v. Roberts, 768 F. Supp. 1442 (D. Kan. 1991), *aff'd*, 963 F.2d 308 (10th Cir. 1992). On appeal of the decision of the federal district court denying habeas relief, the Tenth Circuit nevertheless held expert testimony concerning the battered woman syndrome "crucial" to whether the woman possessed the specific intent necessary to aid and abet her batterer. *Dunn*, 963 F.2d at 312–13. This psychiatric testimony, according to the circuit court, provided an alternative reason for the woman's continued presence with her abuser and thus supported her assertion that she lacked the requisite mens rea. *Id.* at 313. *See also* McMaugh v. State, 612 A.2d 725, 733 (R.I. 1992) (evidence of battered woman syndrome rebuts element of premeditation in first-degree murder).

[161] Sam v. Commonwealth, 411 S.E.2d 832, 839 (Va. Ct. App. 1991).

[162] United States v. Contento-Pachon, 723 F.2d 691, 694 (9th Cir. 1984).

[163] DRESSLER, *supra* note 68, at 259; KADISH & SCHULHOFER, *supra* note 131, at 936; LAFAVE & SCOTT, *supra* note 70, § 5.3(b), at 436. Of the thirty-five jurisdictions that have codified duress, three (Arizona, Washington, and Louisiana) require an "immediate" threat; one (Minnesota) requires an "instant" threat; and sixteen (Alabama, Connecticut, Georgia, Illinois, North Dakota, Indiana, Iowa, Kansas, Maine, Missouri, Montana, New York, Tennessee, Texas, Utah, and Wisconsin) explicitly require an "imminent" threat. Courts in four other jurisdictions (California, Colorado, New Hampshire, and Oregon) read an imminence or immediacy element into their duress statutes. *See infra* APPENDIX. Most of the remaining jurisdictions that have not codified duress retain the common law requirement that the threatened harm be "present, imminent, and pending." *See, e.g.*, Cawthon v. State, 382 So. 2d 796 (Fla. Dist. Ct. App.); State v. Crawford, 521 A.2d 1193 (Md. 1987); Commonwealth v. Robinson, 415 N.E.2d 805 (Mass. 1981); People v. Hubbard, 320 N.W.2d 294 (Mich. Ct. App. 1982); State v. Castrillo, 819 P.2d 1324 (N.M. 1991); State v.

requirement generally mandates that the threatened harm be "present, imminent, and impending."[164] To be "present," a threat must operate "on the mind of the actor at the time of the criminal act."[165] "Imminent" or "impending" likewise demand that the threatened harm be "pretty close to happening" and not too remote in time.[166] Indeed, in the context of duress,[167] many courts equate "imminent" with "immediate."[168] Thus, traditional duress "typically involve[s] threatened injuries that will follow nearly instantly if the coerced actor fails to obey."[169] Threats of future death or serious bodily injury[170] or "veiled threats of future unspecified harm"[171] will not suffice.[172]

Carver, 385 S.E.2d 145 (N.C. 1989); State v. Harr, 610 N.E.2d 1049 (Ohio Ct. App. 1992); State v. Robinson, 363 S.E.2d 104 (S.C. 1987); State v. Cram, 600 A.2d 733 (Vt. 1991); Pancoast v. Commonwealth, 340 S.E.2d 833 (Va. Ct. App. 1986); State v. Tanner, 301 S.E.2d 160 (W. Va. 1982); Amin v. State, 811 P.2d 255 (Wyo. 1991).

[164] Dressler, *supra* note 131 at 1340; *see also Contento-Pachon*, 723 F.2d at 694 (threat of injury must be "present, immediate, or impending").

[165] Dressler, *supra* note 131, at 1340.

[166] LAFAVE & SCOTT, *supra* note 70, § 5.3(c), at 438–39; *see also* MO. ANN. STAT. § 562.071 cmt. (Vernon 1979) ("The threat of force must be 'imminent.' This term is not defined, but it clearly indicates that the threat should not be remote in time. However, neither is it necessarily limited to the last possible second."); Sam v. Commonwealth, 411 S.E.2d at 839 ("Imminent connotes less than immediate, yet still impending and present.").

[167] This contrasts with the typically broad construction of "imminence" in the context of self-defense. *See supra* note 102 and accompanying text.

[168] *See* United States v. Jordan, 722 F.2d 353, 358–59 (7th Cir. 1983) (though Illinois duress statute requires "imminent" harm, court upheld denial of compulsion instruction in absence of evidence that defendant feared immediate, serious physical injury or harm); Hill v. State, 219 S.E.2d 18,19 (Ga. Ct. App. 1975) (notwithstanding statutory "imminence" requirement, court held that fear must be of present and immediate violence); *see also* N.Y. PENAL LAW § 40.00 cmt. (McKinney 1987) (interpreting "imminent" threat as "immediate physical force or immediate threat of physical force"—one capable of "immediate exercise of realization"); TENN. CODE ANN. § 39-11-504 cmt. (West 1994) ("The standard sufficient to excuse criminal conduct is that the compulsion must be immediate and imminently present . . . .").

[169] Dressler, *supra* note 131, at 1340. *See also* United States v. Gaviria, 804 F. Supp. 476, 478 (E.D.N.Y. 1992) (coerced actor must "be presented with an immediate and clear choice between commission of the crime charged or of serious harm to [herself] or another without reasonable means to escape").

[170] DRESSLER, *supra* note 68, at 259; LAFAVE & SCOTT, *supra* note 70, § 5.3(b), at 436.

[171] United States v. Contento-Pachon, 723 F.2d 691, 694 (9th Cir. 1984).

[172] *See* State v. Harding, 635 P.2d 33, 35 (Utah 1981) (threats "directed at some indefinite time in the future" insufficient); Sam v. Commonwealth, 411 S.E.2d 832,

This aspect of imminence often invalidates the duress defense of battered women who commit crimes outside the presence of their batterers.[173] The coercing party generally must be present with the accused during her commission of an offense for his threat to qualify as "imminent and impending."[174] Any geographic distance between a batterer and an accused at the time of the alleged threat thus may doom a battered offender's claim of duress.[175]

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839 (Va. Ct. App. 1991) (threats "that might occur at some uncertain time that is distant and separate from the period of duress or coercion" not imminent).

[173] *See supra* note 17.

[174] Donald T. Lunde & Thomas E. Wilson, *Brainwashing as a Defense to Criminal Liability: Patty Hearst Revisited*, 13 CRIM. L. BULL. 341, 354–55 (1977). This traditional reading of "imminence" may adversely impact a battered offender's defense. In United States v. Santos, 932 F.2d 244 (3d Cir. 1991), *cert. denied*, 502 U.S. 985 (1991), for example, a woman who claimed that her abusive husband had coerced her into participating in a number of cocaine-related transactions received the following jury instruction on duress:

> You heard the evidence. You will have to determine whether or not, first of all whether the threat was immediate. *Keep in mind whether her husband was even present on any of these transactions*; . . . When you analyze the evidence, these are a series of transactions which occurred over a period of almost a year, six or seven transactions, and you have to consider whether or not under the circumstances under which this lady got involved in these transactions [she] was really acting under the fear that if she did not do this she would be subject to serious bodily harm; that it was immediate; that there was no way to avoid it, it was inescapable.
>
> Certainly an abusive husband is no license to become involved in transactions, half pound or half ounce or half kilo transactions of narcotics.

Id. at 253 (emphasis added). The Third Circuit upheld the instruction, as well as Mrs. Santos' conviction. *Id.* at 254.

[175] United States v. Homick, 964 F.2d 899 (9th Cir. 1992), illustrates this obstacle. In *Homick*, a battered woman sought admission of expert testimony concerning the battered woman syndrome to help establish that her ex-husband had coerced her to falsify an affidavit regarding the ownership of a stolen ring. Although the ex-husband was living with the woman at the time of the offense, he was out of town at the time he made two allegedly coercive telephone calls to the woman. In upholding the trial court's exclusion of the expert testimony, the Ninth Circuit stated:

> We recognize that the unique nature of the battered woman syndrome justifies a somewhat different approach to the way we have historically applied these principles. However, we do not think that the facts of this case fall within the scope of any reasonable approach to the battered woman defense, no matter

Moreover, even if willing to acknowledge the psychological "presence" of an absent batterer's threat,[176] a court will likely find the constant, but "generalized" fear by which batterers hold their partners captive insufficient to satisfy the temporal strictures of imminence.[177] Indeed, because duress generally requires a specific threat of nearly instantaneous harm, that defense will not typically encompass "the effects of subtle, ongoing forms of physical and psychological abuse" resulting from severe, long-term domestic violence.[178]

A "present and imminent" harm must also be "continuous." The accused must apprehend imminent harm throughout the entire time she commits a crime.[179] Thus, if an offense involves conduct over a span of

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how we modify the traditional duress standards.

Id. at 905–06 (citations omitted).

[176] *See, e.g.*, State v. Torres, 657 P.2d 1194, 1197 (N.M. Ct. App. 1983) (batterer's absence from scene of crime not fatal to battered woman's claim of duress).

[177] A perceived lack of immediacy also motivated the Eleventh Circuit's decision in United States v. Sixty Acres in Etowah County, 930 F.2d 857 (11th Cir. 1991). *See supra* note 147. In rejecting a battered woman's claim of coercion, the Eleventh Circuit held:

> In our view, circumstances justify a duress defense only when the coercive party threatens *immediate* harm which the coerced party cannot reasonably escape. The evidence at the hearing, however, showed only that Mrs. Ellis feared her husband. This *generalized* fear provokes our sympathy, but it cannot provoke the application of a legal standard whose essential elements are absent. Nothing in the record before us suggests that Mr. Ellis threatened immediate retaliation to his wife if she refused to cooperate in the drug scheme which caused his arrest. Everything in the record before us suggests that Mrs. Ellis had ample opportunity to flee or to contact law enforcement agents regarding her husband's activities. We therefore must hold that, on these facts, Mrs. Ellis cannot utilize the defense of duress to justify her consent to her husband's conduct.

Id. at 861. See also *infra* notes 186–91 and accompanying text for further discussion of the inescapability requirement of duress.

[178] United States v. Gaviria, 804 F. Supp. 476, 478 (E.D.N.Y. 1992).

[179] *See* State v. Myers, 664 P.2d 834 (Kan. 1983) (no duress defense when compulsion not always imminent, continuous, and uninterrupted); Commonwealth v. Melzer, 437 N.E.2d 549, 553 (Mass. Ct. App.), *review denied*, 440 N.E.2d 1177 (Mass. 1982) (imminent threat must continue throughout the entire course of criminal conduct); State v. Tanner, 301 S.E.2d 160, 163 (W. Va. 1982) (threat must be "continuous"); *see also* TENN. CODE ANN. § 39-11-504 (1991) ("The threatened harm must be continuous throughout the time the act is being committed . . . ."); Lunde & Wilson, *supra* note 174, at 354–55 ("Apprehension of immediate danger must

time, the pressures creating the alleged duress must continuously operate throughout the entire course of conduct.[180] A defendant loses her defense of duress "as soon as the claimed duress . . . [has] lost its coercive force,"[181] or as soon as she is "out of range" of the alleged compulsion.[182]

This component of "imminence" clearly presents obstacles to battered offenders who commit so-called "course of conduct" crimes that involve a series of criminal acts committed over a period of time.[183] In such cases, a battered woman may find it "extraordinarily difficult, if not impossible," to demonstrate that her batterer's deadly threat persisted throughout the entire course of criminal conduct.[184] Even cases that do not involve "course of conduct" crimes may lack imminence if any appreciable period of inactivity lies between the batterer's threat and the accused's crime. The cyclical nature of many battering relationships, particularly the relatively calm period of loving contrition, may thus prevent a battered woman from demonstrating the imminence of the alleged compulsion.[185]

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must continue during the whole time the crime is committed.").

[180] United States v. Bailey, 444 U.S. 394, 412–13 & n.9 (1980) (involving a prison escape).

[181] LAFAVE & SCOTT, *supra* note 70, § 5.3(b), at 437.

[182] WILLIAMS, GENERAL, *supra* note 124, at 758 ("As soon as defendant is out of range he must go to the police, and must show reasonable firmness in braving [the coercer's] threat. If, however, [the coercer] may come back at any moment, so that this threat previously made is a continuing menace to [defendant], it is capable of amounting to duress.").

[183] *See supra* note 18.

[184] United States v. Gregory, No. 88CR295, 1988 U.S. Dist. LEXIS 10060, at *4 n.4 (N.D. Ill. Sept. 2, 1988). In *Gregory*, a battered woman accused of participating with her husband in a fraudulent tax scheme that occurred over the course of three years asserted a "duress defense in terms of the battered woman syndrome." *Id.* at *3–4. Without ruling on the propriety of that defense, the district court noted: "Obviously this exceptional defense may fit a one-time event (say a duress-induced killing) far more readily than a course-of-conduct crime." *Id. See also* United States v. Johnson, 956 F.2d 894, 901 (9th Cir. 1992) (while jury found that battered woman acted under duress in connection with three counts of drug distribution, it rejected view that woman acted under complete duress for the six months that she was involved in the drug dealing conspiracy); United States v. Sebresos, No. 91-10193, 1992 U.S. App. LEXIS 17757, at *1 (9th Cir. July 22, 1992) (while immediacy requirement judged according to facts of case, this requirement of duress "will be harder to satisfy with a course of conduct crime such as [battered woman's] embezzlement scheme").

[185] The case of State v. Dunn, 758 P.2d 718 (Kan. 1988), *habeas corpus granted sub nom.* Dunn v. Roberts, 768 F. Supp. 1442 (D. Kan. 1991), *aff'd*, 963 F.2d 308 (10th Cir. 1992), illustrates this particular obstacle. In *Dunn*, a seventeen-year old woman admittedly accompanied her boyfriend on a two-and-one-half week murderous

d. *Inescapability*

Courts will often hold a batterer's threat insufficiently "imminent" if a battered offender fails to take advantage of a perceived opportunity to escape or report her abuser's crime to authorities.[186] Indeed, the threshold element of "imminence" naturally intertwines with the separate prerequisite of "inescapability," for if a coercer's threat is not "imminent," the accused could likely avoid the threat without undue danger.[187]

"Inescapability" traditionally requires that a defendant reasonably believe that committing the crime was the *only* way to avoid the threatened danger. The accused cannot claim duress if she had *any* reasonable opportunity to extricate herself from the coercive situation without committing the crime, either by resisting the coercer or escaping.[188]

The social, economic and psychological barriers that prevent battered women from leaving an abusive relationship or from seeking outside assistance thus may obstruct their successful assertion of duress. Even courts that acknowledge the "extraordinary courage" that it takes to leave

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"crime spree" through several states. *Id.* at 722. The woman claimed that she unwillingly accompanied her boyfriend after he threatened her and her family with physical violence. She sought to bolster her claim of compulsion with expert testimony concerning the battered woman syndrome. *Id.* at 725. In upholding the denial of expert witness fees, as well as an instruction on duress, the Kansas Supreme Court noted that the boyfriend's threats occurred more than two weeks before the murders and that his subsequent threats merely "consisted of intermittent reminders . . . of the prior intimidation." *Id.* at 726. Moreover, the boyfriend's threats were not "continuous" because he admittedly treated the woman "nice at times" during his mood swings. *Id.* The lack of an imminent and continuous threat thus precluded duress as a matter of law. *Id.* at 727. *See also* State v. Vanzant, No. 64010, 1993 Ohio App. LEXIS 5220, at *3 (Ohio Ct. App. Oct. 28, 1993) (duress unavailable when jailed boyfriend did not present immediate threat of bodily injury).

[186] *See* United States v. Sixty Acres in Etowah County, 930 F.2d 857, 861 n.2 (11th Cir. 1991) ("[W]e insist that claimants under no *immediate* threat of reprisal either communicate their knowledge to police, or attempt to remove themselves from the scene of illegal activity."); *Dunn*, 758 P.2d at 726 (intimidation not continuous because defendant had ample opportunity to escape when boyfriend slept or when couple went out in public); *Vanzant*, 1993 Ohio App. LEXIS 5220, at *2 ("Duress . . . requires an immediate threat . . . which cannot be remedied by the person who asserts the defense either by escaping or by utilizing self help . . . .").

[187] LAFAVE & SCOTT, *supra* note 70, § 5.3(c), at 438–39.

[188] DRESSLER, *supra* note 68, at 259–60; LAFAVE & SCOTT, *supra* note 70, § 5.3(c), at 438–39; PERKINS & BOYCE, *supra* note 121, at 1060; WILLIAMS, TEXTBOOK, *supra* note 124, at 631.

an abusive relationship may reject duress if the woman could physically leave her husband.[189] Moreover, when criminal activity extends over any appreciable period of time, as in course of conduct crimes, a battered offender may be forced to establish herself a virtual prisoner of her abuser, "with absolutely no opportunity to leave his presence long enough to seek assistance from law enforcement authorities."[190] In short, if a battered woman has any opportunity to seek the protection of the police, a women's shelter, or other social or legal assistance, her apparent ability to avoid committing an offense may effectively foreclose her from claiming duress.[191]

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[189] Judge Weinstein, for example, has acknowledged the difficulties battered women face in satisfying the inescapability element of duress:

> Had defendant not pled guilty she probably would not have been able to successfully plead duress. She was not faced with a stark and immediate choice between physical harm and commission of the particular crime for which she was indicted. *While it would have been an act of extraordinary courage and perhaps recklessness, she could have left her husband.* She knew that she was committing a crime by participating in drug dealing and she chose to exercise whatever free will she had to act criminally.

United States v. Gaviria, 804 F. Supp. 476, 481 (E.D.N.Y. 1992) (emphasis added). In *Gaviria*, Judge Weinstein considered such "incomplete duress" relevant only to sentencing. *Id.* at 480–81. *See infra* notes 271–89 and accompanying text.

[190] United States v. Gregory, No. 88CR295, 1988 U.S. Dist. LEXIS 10060, at *4 (N.D. Ill. Sept. 2, 1988). In *Gregory*, the battered offender's ability to "come and go," maintain employment, communicate with friends, and obtain government assistance prevented her from proving duress. *Id. See also* State v. Vanzant, No. 64010, 1993 Ohio App. LEXIS 5220, at *2 (Ohio Ct. App. Oct. 28, 1993) (battered offender "presented with opportunity for self-help or escape" when abusive boyfriend imprisoned).

[191] Inescapability further relates to the additional requirement, in some jurisdictions, that a defendant be free of fault in creating the coercive situation. *See* DRESSLER, *supra* note 68, at 259; ROBINSON, *supra* note 89, § 162(a), at 246–27, § 177(a), at 350. *See also* MODEL PENAL CODE § 2.09(2) (1985) (duress is "unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress"). A battered offender, for example, might be found to have culpably caused the condition of her duress by remaining with an abusive partner. *See, e.g.*, State v. Dunn, 758 P.2d 718, 727 (Kan. 1988) ("If [the battered woman] was a victim, she was a victim of her own poor judgment."), *habeas corpus granted sub nom.* Dunn v. Roberts, 768 F. Supp. 1442 (D. Kan. 1991), *aff'd*, 963 F.2d 308 (10th Cir. 1992); *see also* Blackman, *supra* note 35, at 129 (attributing criminal justice system's "ambivalence" toward battered women to "cultural values about families," including the view of woman as "the responsible one, the one who

e. *Objective v. Subjective Standard: Battered Offender as Person of "Reasonable" Firmness*

Like self-defense, duress consists of both subjective and objective components.[192] An accused must honestly believe that committing a crime is the only way to avoid imminent serious injury. In addition, an accused must demonstrate that a reasonable person under similar circumstances would similarly have succumbed to the threat.[193] Though jurisdictions differ as to how they implement the latter objective backstop, virtually all codifications of the defense assess the impact of a particular threat upon the hypothetical "reasonable person" in the defendant's "situation."[194] As in other areas of criminal law, however, courts often differ in the extent to which they will subjectify this benchmark.

A battered offender's "objective situation"[195] generally includes the

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could and should change, the person who could end her family's violence, if only she would leave").

[192] ROBINSON, *supra* note 89, § 177(d), at 355; Fingarette, *supra* note 131, at 93–94 (both discussing interweaving of objective and subjective elements of duress).

[193] MODEL PENAL CODE § 2.09, explanatory note, at 367 (1985); ROBINSON, *supra* note 89, § 177(c)(2), at 353. Duress, however, does not require that the alleged coercer actually intend to kill or injure the defendant. It is enough that the defendant reasonably perceives such a threat. Dressler, *supra* note 131, at 1336 n.26; *cf.* OKLA. STAT. ANN. tit. 21 § 156 (West 1983) (requiring "actual compulsion by use of force or fear").

[194] Federal courts applying federal law require a "well-grounded" apprehension of deadly imminent harm, as well as the lack of any "reasonable" legal alternative to violating the law. *See* United States v. Willis, 38 F.3d 170, 175 (5th Cir. 1994); United States v. Johnson, 956 F.2d 894, 897–98 (9th Cir. 1992); United States v. Contento-Pachon, 723 F.2d 691, 693 (9th Cir. 1984). Some states require that a defendant "reasonably believe" that the threatened harm is imminent and can be averted only by committing the criminal act (California, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Minnesota, Montana, Nevada, and Washington). Others inquire whether a "reasonable person" (Alaska, Colorado, Delaware, Kentucky, Maine, and South Dakota) or a "person of reasonable firmness" (Connecticut, Hawaii, Indiana, Missouri, New Jersey, New York, North Dakota, Pennsylvania, Texas, and Utah), in the defendant's "situation" would have been able to resist a particular threat. *See infra* APPENDIX; *see also* MODEL PENAL CODE § 2.09(1) (1985). Still others combine these various formulations, evaluating both the reasonableness of a defendant's subjective belief and her choice to engage in criminal conduct. *See infra* APPENDIX (Arizona, Arkansas, and Tennessee).

[195] *Johnson*, 956 F.2d at 898. Almost all definitions of duress permit the fact-finder to account for the "situation" or "circumstances" in which the defendant was

previous experiences she has had with the alleged coercer, including any history of abuse between them. As explained by the Ninth Circuit, "[f]ear which would be irrational in one set of circumstances may be well-grounded if the experience of the defendant with those applying the threat is such that the defendant can reasonably anticipate being harmed on failure to comply."[196] A court that narrowly construes the "immediacy" requirement of duress, however, may well find such evidence of prior abuse irrelevant to assessing the reasonableness of a battered offender's conduct.[197]

Moreover, while courts are increasingly willing to subjectify a coercive "situation" with external physical characteristics like size, strength, age, or health,[198] "idiosyncrasies of an individual's temperament"[199] that render a defendant unusually susceptible to coercion are often ruled irrelevant.[200]

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allegedly coerced. *See* MODEL PENAL CODE § 2.09 cmt. 2, at 374 (1985); *see also infra* APPENDIX (Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Kentucky, Maine, South Dakota, and Utah).

[196] *Johnson*, 956 F.2d at 898 (prior abuse included within "objective situation" confronting battered offender); *see also Willis*, 38 F.3d at 177 n.8 (a defendant's "objective situation" includes both "immediate circumstances of the crime" and "evidence concerning the defendant's past history with the person making the unlawful threat"); Commonwealth v. Ely, 578 A.2d 540, 542 (Pa. Super. Ct. 1990) (duress assessed under *"totality of the circumstances* (including past abuse and appellant's mental capacity)").

[197] *See, e.g.*, State v. Bockorny, 863 P.2d 1296, 1298 (Or. Ct. App. 1993) ("consideration of the entire circumstances" does not mean "circumstances outside of the immediate ones" addressed in duress statute); Kessler v. State, 850 S.W.2d 217, 222 (Tex. Ct. App. 1993) (batterer's prior threats made before battered woman committed burglary failed to demonstrate that defendant "perceived a threat of *imminent* death or serious bodily injury")

[198] Such "stark, tangible factors . . . differentiate the actor from another." State v. Toscano, 378 A.2d 755, 764 (N.J. 1977); *see also* MODEL PENAL CODE § 2.09 cmt. 3, at 375 (1985).

[199] *Toscano*, 378 A.2d at 766.

[200] *See* United States v. Smith, 987 F.2d 888 (2d Cir.), *cert. denied*, 114 S. Ct. 209 (1993); *Toscano*, 378 A.2d at 763-64, 766; *see also* ROBINSON, *supra* note 89, § 177(f), at 365 (duress inapplicable to purely internal psychological incapacity and will not excuse actor who lacks the fortitude to make moral choice); WILLIAMS, TEXTBOOK, *supra* note 124, at 633 (impossible to reconcile wholesale importation of defendant's personal characteristics into objective standard of duress).

This traditional reluctance to import mental characteristics or psychological incapacities into the "person of reasonable firmness" reflects the broader "unwillingness" of the criminal law "to vary legal norms with the individual's capacity to meet the standards they proscribe, absent a disability that is both gross and

The battered woman defense, with its current internal, psychological focus, obviously does not fare well under the objective standard of duress.[201]

Many courts refuse to invest the hypothetical person of "reasonable firmness" with the psychological and behavioral effects of long-term severe battering. These courts distinguish "objective evidence" of a defendant's fear, such as the batterer's violent nature or prior incidents of abuse, from "subjective perceptions stemming from the battered woman syndrome."[202] As recently explained by the Fifth Circuit:

> Evidence that the defendant is suffering from the battered woman's syndrome is inherently subjective . . . . Such evidence is not addressed to whether a person of reasonable firmness would have succumbed to the level of coercion present in a given set of circumstances. Quite the contrary, such evidence is usually consulted to explain why this particular defendant succumbed when a reasonable person without a background of being battered might not have. Specifically, battered woman's syndrome evidence seeks to establish that, because of her psychological condition, the defendant is unusually susceptible to the coercion.[203]

The battered offender's "situation," then, ordinarily will not encompass "the effects of subtle, ongoing forms of physical and psychological abuse" that heighten her susceptibility to threats, distort her

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verifiable, such as the mental disease or defect that may establish irresponsibility." MODEL PENAL CODE § 2.09 cmt. 2, at 374 (1985). See *infra* notes 310–24 and accompanying text for a discussion of the inherently objective nature of duress as a defense to criminal liability.

201 See *supra* notes 98–115 and accompanying text for a discussion of the battered woman defense both in theory and in practice.

202 United States v. Willis, 38 F.3d 170, 177 (5th Cir. 1994); *see also* United States v. Johnson, 956 F.2d 894, 899–903 (9th Cir. 1992); United States v. Gaviria, 804 F. Supp. 476, 478–79 (E.D.N.Y. 1992) (both distinguishing the external objectively verifiable compulsion essential to "complete" duress, from the more subjective and individualized "incomplete" duress relevant only to sentencing).

203 *Willis*, 38 F.3d at 175. In *Willis*, a battered woman raised duress as a defense to a charge of carrying a firearm during the commission of a drug trafficking crime. The woman allegedly feared that her abusive boyfriend would beat her unless she permitted him to place the gun in her purse. While the district court allowed the woman to introduce evidence of the boyfriend's prior abuse, as well as some psychiatric testimony concerning her mental state, it excluded expert testimony concerning the battered woman syndrome itself. The Fifth Circuit upheld the trial court's ruling, holding such subjectification of duress both "contrary to settled duress law" and "unwise." *Id.* at 176–77. *See infra* parts VI and VII (exploring the assumption that extending duress in defense of battered offenders would require an imprudent modification of that defense).

perception of imminence, or disable her from escaping.[204] Courts, instead, view the battered offender as suffering from some "individual psychological incapacity,"[205] "special subjective vulnerability to fear,"[206] or "abnormal stresses of life."[207] To many courts, then, such internal incapacity is simply irrelevant, "for purposes of determining criminal responsibility,"[208] to the "stringent objective standard" of classic duress.[209]

V. CIRCUMVENTING THE OBSTACLES

Courts, legislatures, and commentators suggest various means to aid battered offenders in circumventing the impediments posed by classic

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[204] *Gaviria*, 804 F. Supp. at 478–79. Notwithstanding that the defendant in *Gaviria* represented the "classic example of the plight of a subservient, abused woman," Judge Weinstein doubted that she could successfully plead complete duress. *Id.* at 481. In his opinion, the judge acknowledged "the cycle of victimization and dependence" produced by systematic domestic abuse. *Id.* at 479. He also recognized that battered women can live in a "relationship of complete subservience" to their batterer, whose "control can result from a combination of physical and psychological abuse, cultural norms, economic dependence and other factors." *Id.* Nevertheless, Judge Weinstein found this relationship of subservience insufficient, in itself, to excuse battered women who commit criminal acts under the command or control of their abusers. *Id.* at 478–79. Instead, he viewed such "incomplete duress" as relevant only in sentencing. *Id.* at 479.

[205] United States v. Sebresos, No. 91-10193, 1992 U.S. App. LEXIS 17757, at *7 (9th Cir. July 22, 1992).

[206] *Johnson*, 956 F.2d at 898; *see also id.* at 902. The Ninth Circuit, in *Johnson*, acknowledged that the "purely subjective vulnerability" produced by the battered woman syndrome affects a battered woman's subjective evaluation of her circumstances. *Id.* at 898–99. Because a battered woman generally does not suffer from any "gross and verifiable" disability, however, her increased "susceptibility to the threat of force," does not constitute "complete duress" sufficient to excuse. *Id.* at 899–903.

[207] State v. Riker, 869 P.2d 43, 51 (Wash. 1994).

[208] United States v. Willis, 38 F.3d 170, 176 (5th Cir. 1994). Although courts generally view the battered woman defense as irrelevant to "complete duress" sufficient to excuse, they will often consider such "incomplete duress" in connection with sentencing, where "legal standards are more subjective and less strict." United States v. Gaviria, 804 F. Supp. 476, 479 (E.D.N.Y. 1992). *See also Willis*, 38 F.3d at 175–76; United States v. Johnson, 956 F.2d 894, 898 (9th Cir. 1992). See *infra* notes 271–89 and accompanying text for a detailed discussion of the role duress plays (or should play) in mitigation of punishment.

[209] *Gaviria*, 804 F. Supp. at 478–79.

duress. A number of states, for example, follow, at least partially, the lead of the Model Penal Code and have reformulated duress by deleting some of its traditional elements. In jurisdictions where classic duress still prevails, courts may modify or liberally construe its elements so as to enable battered offenders to get their claims of duress to a jury. Evidentiary reforms aimed at facilitating the admissibility of the battered woman defense in cases of self-defense are being extended, in a few states, to cases of duress. Finally, even courts that regard the battered woman defense as irrelevant to complete duress might nevertheless utilize such evidence in mitigation of punishment.[210] This Part of the Article examines each of these suggested reforms to determine the extent to which any or all of them aid battered offenders in asserting duress.

A. *Reformulating Duress: Model Penal Code § 2.09*

The Model Penal Code reformulates the parameters of duress as follows:

> It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.[211]

This delineation substantially expands the defense of duress by removing many of its threshold elements and designating them instead as mere

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[210] A court unwilling to sub silentio eliminate or modify the traditional standards of duress might also permit a battered offender to utilize evidence of prior abuse and its psychological effects to support a mental status defense. The inability to claim duress should not preclude battered offenders from asserting insanity or temporary insanity, provided the jurisdiction recognizes such defenses. Again, however, a battered offender will likely be unable to establish that she suffers from the "mental disease or defect" generally required for legal insanity. *See supra* note 113. Further, if a jurisdiction accepts the defense of diminished capacity, a battered offender could argue that her abuser's coercion prevented her from forming the criminal intent required for an offense. *See* United States v. Sebresos, No. 91-10193, 1992 U.S. App. LEXIS 17757, at *9 (9th Cir. July 22, 1992) ("Psychiatric evidence that goes beyond a defendant's cognitive defects is admissible to negate specific intent."); State v. Lambert, 312 S.E.2d 31, 34 (W. Va. 1984) (battered woman "entitled to present evidence to support such theories as the battered spouse syndrome, which go to negate criminal intent"); *see also supra* notes 113 and 160 for a discussion of mental status defenses to a charge of homicide.

[211] MODEL PENAL CODE § 2.09(1) (1985).

factors for consideration by the fact-finder.[212] In so doing, the Model Penal Code eliminates many—although not all—of the roadblocks that obstruct battered women from successfully asserting duress.[213]

1. *Nature of Coercive Threat*

The Model Penal Code broadly extends duress in cases of the use or threatened use of "unlawful force against [a defendant's] person or the person of another . . . ."[214] Unlike common law duress, then, duress under the Model Penal Code encompasses threats of personal injury less serious than death or serious bodily harm. Moreover, the Code does not appear to require as close a connection between the threat and the crime committed as that required under classic duress.[215] Thus, the Model Penal Code arguably affords a battered woman a duress defense even if her abuser did not threaten death or serious bodily injury and even if he did not explicitly demand commission of the charged offense. Approximately fourteen states follow the Model Penal Code and excuse when coercion involves less serious unlawful threats.[216]

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[212] For a discussion of the manner in which the Model Penal Code broadens common law duress, see DRESSLER, *supra* note 68, at 270–72; Dressler, *supra* note 131, at 1343–44; Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 679 (1988).

[213] *See* United States v. Johnson, 956 F.2d 894, 900 (9th Cir. 1992) (battered woman syndrome "has a particular relation to the defense of duress as it has been expanded by the commentary to Model Penal Code").

[214] MODEL PENAL CODE § 2.09(1) (1985). The Model Penal Code adheres to the common law requirement of an unlawful *human* threat of *personal injury*. *See supra* notes 133–39 and accompanying text. Professor Dressler argues that the Code does not go as far as its reasoning suggests when it relegates threats to economic interests, property, and reputation, to the "lesser-evils" defense of necessity. *See* Dressler, *supra* note 131 at 1376; Dressler, *supra* note 212, at 708–15.

[215] *See* MODEL PENAL CODE § 2.09 cmt. 3, at 377 (1985) ("[O]n grounds of policy it should not matter whether the crime committed by the victim of coercion is one the author of coercion demands."). This Code commentary appears specifically aimed at the situation in which a prison inmate escapes confinement to avoid homosexual assaults. *See id.* For a discussion of the analogy between the prison escapee and the battered woman, see *infra* notes 236–52 and accompanying text.

[216] *See infra* APPENDIX (Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Kentucky, Missouri, New Jersey, New York, Oregon, Pennsylvania, South Dakota, and Utah).

2. *Nature of Offense*

As previously indicated, traditional duress cannot be asserted by battered women charged with murder.[217] The Model Penal Code removes this limitation and allows duress to excuse any crime.[218] Twelve jurisdictions appear to have similarly expanded the types of offenses to which duress may be asserted as a defense.[219]

3. *Immediacy*

The modification of duress that holds most promise for battered offenders is the Code's deletion of "imminence" as a threshold element of the defense. As previously demonstrated, battered offenders cannot establish even a prima facie case of classic duress unless they are faced with a direct and immediate choice between serious physical harm and commission of the charged offense.[220] The Code rejects this absolute requirement of temporal proximity in favor of making "imminence" but one of many factors for consideration by the fact-finder in assessing whether a defendant's will had been reasonably overborne.[221]

Equally significant is the Code's recognition that "long and wasting pressure may break down resistance more effectively than the threat of immediate destruction."[222] The Code thus extends duress to the claims of "brainwashed" victims:

> [S]uppose that by the continued use of unlawful force, persons effectively break down the personality of the actor, rendering [them] submissive to whatever suggestions they make. They then, using neither force nor threat of force on that occasion, suggest that [s]he perform a criminal act; and the actor does what they suggest. The "brainwashed" actor would not be barred from claiming the defense of duress, since [s]he may assert that

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217 *See supra* notes 151–60 and accompanying text.

218 The Code rejects the view of some commentators that duress is a sub-species of the lesser-evils necessity defense. Instead, the drafters of the Code viewed it "obvious that even homicide may sometimes be the product of coercion that is truly irresistible . . . ." MODEL PENAL CODE § 2.09 cmt. 3, at 376 (1985). *See also* MODEL PENAL CODE § 2.09 cmt. 2, at 372–73 (1985) (distinguishing duress from necessity).

219 *See infra* APPENDIX (Alaska, Arkansas, Connecticut, Delaware, Hawaii, New Jersey, New York, North Dakota, Pennsylvania, Tennessee, Texas, and Utah).

220 United States v. Gaviria, 804 F. Supp. 476, 479, 481 (E.D.N.Y. 1992). *See supra* notes 161–85 and accompanying text.

221 MODEL PENAL CODE § 2.09 cmt. 3, at 375–76 (1985).

222 *Id.* at 376.

> [s]he was "coerced" to perform the act by the use of unlawful force on [her] person. [S]he might also argue that [s]he is responding to earlier threats to use unlawful force that have rendered [her] submissive to those who made the threats because [s]he still subconsciously fears they will be carried out. Of course, it may be very difficult to persuade a jury that an act willingly performed at the time was truly the product of unlawful force and would have been performed by persons of reasonable firmness subjected to similar conditions, but, as framed, the [duress] section is broad enough to permit such an argument.[223]

"Brainwashing" refers to a psychological conditioning process designed to instill in its victims a feeling of complete helplessness in which "eventually, only subtle threats would be required to maintain control over the victim."[224] Given the striking similarity between brainwashing and the battered woman syndrome,[225] the Code's deletion of "imminence" as a threshold requirement may permit many battered offenders who commit their crimes under their abuser's threatening shadow to claim duress.[226] Of

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[223] *Id.* at 376–77.

[224] United States v. Winters, 729 F.2d 602, 605 (9th Cir. 1984). Courts and commentators may differ in their definition of brainwashing or, as called by some, "coercive persuasion." *See infra* note 388.

[225] It is not surprising that a significant number of courts and commentators analogize the plight of a battered offender to that of a hostage, POW, or brainwashing victim. *See, e.g.*, United States v. Johnson, 956 F.2d 894, 899–900 (9th Cir. 1992) (comparing psychological effects of the battered woman syndrome to effects on hostages and POWs who exist under "threatening shadow of . . . complete domination "); Neelley v. State, 494 So. 2d 669, 677, 682 (Ala. Crim. App. 1985) (battered woman's defense a "combination of duress, the battered woman syndrome, and coercive persuasion"), *aff'd*, 494 So. 2d 697 (Ala. 1986), *cert. denied*, 480 U.S. 926 (1987), *denial of post conviction relief aff'd*, 642 So. 2d 494 (Ala. Crim. App. 1993), *writ quashed as improvidently granted*, 642 So. 2d 510 (Ala. 1994), *cert. denied*, 115 S. Ct. 1316 (1995); State v. Torres, 657 P.2d 1194, 1196 (N.M. 1983) (batterer "subjected defendant to his will and beliefs" "[t]hrough a pattern of discipline, beating, and teaching"); *see also* Appel, *supra* note 24, at 975–76 (using hostage analogy to support extension of the battered woman syndrome to cases of duress). This analogy has long been made in the self-defense context. *See supra* notes 103–06 and accompanying text. Of course, many courts are not persuaded by such comparisons. *See Neelley*, 494 So. 2d at 682 (stating that the brainwashing defense is not accepted in any jurisdiction); State v. Dunn, 758 P.2d 718, 727 (Kan. 1988), *habeas corpus granted sub nom.* Dunn v. Roberts, 758 F. Supp. 1442 (D. Kan. 1991), *aff'd*, 963 F.2d 308 (10th Cir. 1992) (as a matter of law, hostage or captivity syndrome not applicable to battered woman who is not subject to brainwashing or total breakdown of her personality).

[226] *But cf.* Commonwealth v. Ely, 578 A.2d 540, 542 (Pa. Super. Ct. 1990)

all the modifications to duress wrought by the Code, however, its elimination of "imminence" has been the least influential.[227] Unless judicially modified, then, the element of immediacy retained by a majority of jurisdictions will continue to prevent battered victims of "brainwashing" from asserting duress.[228]

4. *Objective Reasonableness*

Unlike its reform of self-defense, the Model Penal Code retains an objective standard of reasonableness for duress.[229] Even under the Code, a defendant "must have been coerced in circumstances under which a *person of reasonable firmness in his situation* would likewise have been unable to resist."[230]

Whether a battered offender can satisfy this objective standard may again largely hinge on a court's willingness to import the psychological and behavioral characteristics of battered women into the accused's situation."[231] While the Code does not ordinarily consider such "matters of temperament" part of a defendant's "situation,"[232] it does invest ultimate

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(noting that because Pennsylvania has eliminated imminence from law of duress, battered woman syndrome is not as crucial in duress context as it is in self-defense).

[227] Only nine states similarly omit any temporal requirement from their definition of duress. *See infra* APPENDIX (Alaska, Arkansas, Delaware, Hawaii, Idaho, Kentucky, New Jersey, Pennsylvania, and South Dakota).

[228] The Code commentary recognizes this fact. *See* MODEL PENAL CODE § 2.09 cmt. 3, at 376–77 n.40 (acknowledging that the "argument for brainwashing could not easily be made under the provision of many statutes"). For a discussion of the "slippery slope" concerns raised by any extension of duress that encompasses "brainwashing," see *infra* notes 384–402 and accompanying text.

[229] *Compare* MODEL PENAL CODE § 3.04(1) (1985) (self-defense "justifiable when the actor believes that such force is immediately necessary") *with* MODEL PENAL CODE § 2.09(1) (1985) (duress available only if "person of reasonable firmness in his situation would have been unable to resist").

[230] MODEL PENAL CODE § 2.09, explanatory note, at 367 (1985) (emphasis added).

[231] *See supra* notes 107–15, 192–209 and accompanying text.

[232] The traditional unwillingness of our criminal justice system to completely subjectify duress prompted the drafters of the Model Penal Code to reject a standard of duress based solely on the individual fortitude of the particular actor. Instead, the Code relegates psychological infirmities other than insanity to consideration at sentencing. *See* MODEL PENAL CODE § 2.09 cmt. 2, at 374 (1985); *cf.* MODEL PENAL CODE § 2.02 cmt. 4, at 242 (1985) (courts cannot subjectify negligence standard with defendant's internal mental characteristics "without depriving the criterion of all its objectivity").

discretion in the trial court to further individualize that standard with an actor's "purely internal psychic incapacity."[233]

Moreover, and as noted by Professor Dressler, the ultimate issue under the Code is whether an actor has exercised the degree of moral firmness that can be expected of persons in the actor's circumstances," not whether she has satisfied any prima facie elements of duress.[234] The Model Penal Code would thus treat the "reasonableness" of a battered offender's conduct as a matter for the jury to assess in light of all the facts and circumstances, rather than a question of law for the court. Because the Code more deeply involves the jury in the assessment of coercion and apparently permits greater individualization of duress' objective standard, battered offenders will likely fare better under the Code than under more traditional formulations of duress.

B. *Modifying Traditional Elements of Duress*

As previously indicated, the majority of jurisdictions in this country preserve some, if not all, of the traditional elements of duress. Even in such traditional jurisdictions, however, courts may, as in cases of self-defense, liberally construe or modify those elements in order to justify submission of the defense to the jury. Instead of explicitly reformulating the defense, in other words, courts can implicitly accomplish the same end

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England, in contrast, appears more willing to subjectify duress. A recent Law Commission proposal to codify duress would excuse defendants who honestly, but unreasonably, believed that committing a crime was necessary to avoid serious injury. Padfield, *supra* note 131, at 782. This accords with English treatment of other mistakes of fact. *See* Director of Public Prosecutions v. Morgan, 2 All. E.R. 347 (1974). Even the English Law Commission, however, would not completely subjectify duress; the alleged threat must still be "one which in all the circumstances (including any of [the defendant's] personal characteristics that affect its gravity) he cannot *reasonably* be expected to resist." Padfield, *supra* note 131, at 779, 783 (emphasis added).

[233] *See* MODEL PENAL CODE § 2.09 cmt. 3, at 376 n.40 (1985) (in some cases, duress standard "leaves open" the use of an actor's "purely internal psychic incapacity"); MODEL PENAL CODE § 2.02 cmt. 4, at 242 (1985) (leaving definition of "actor's situation" ultimately to the court).

[234] Dressler, *supra* note 131, at 1345. Thus, the Code treats both "imminence" and "inescapability" as evidentiary factors for the jury, rather than as threshold elements of duress. The Code does, however, deny duress to an actor who recklessly places herself in a coercive situation. MODEL PENAL CODE § 2.09(2) (1985). *See supra* note 131.

by treating "imminence" and "inescapability" as fact issues,[235] or by further subjectifying "reasonableness."

1. *Modification of Imminence and Inescapability*

Battered offenders do not need to strike out in uncharted territory to argue for an expansion of traditional duress or its constituent elements. Courts have already modified the elements of imminence and inescapability in a distinct class of cases involving prison inmates who assert duress as a defense to a charge of prison escape. Battered offenders might analogize their plight to that of the prison escapee and argue for a similar modification or expansion of duress.[236]

Like many cases involving battered offenders, the typical prison escape case will not satisfy many of the strictures of classic duress, often because of similar obstacles.[237] The prison escapee typically argues that he needed to violate the law (*i.e.*, flee prison) in order to avoid another inmate's threat of homosexual assault.[238] The coercing party does not compel the prisoner to escape. Instead, he intends to coerce a different act. More importantly, the coercive threat typically concerns a harm that will occur at some indefinite time in the future.[239] The threatened harm is thus neither "immediate," nor "inescapable," as the threatened inmate presumably has time to seek aid from prison authorities.

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[235] *See* ROBINSON, *supra* note 89, § 177(e)(2), at 359 (some courts construe imminence liberally and treat it as a question of fact under all the facts and circumstances).

[236] Although they are not incarcerated by iron bars, battered women are often viewed as similarly imprisoned by the battering relationship. *See, e.g.*, State v. Norman, 378 S.E.2d 8, 17 (N.C. 1989) (Martin, J., dissenting) (battered woman "incarcerated by abuse, by fear, and by her conviction that her husband [is] invincible and inescapable"); *see also supra* notes 103 and 225 (discussion of captivity analogy for battered women).

[237] *See* MODEL PENAL CODE § 2.09 cmt. 3, at 377 (1985); DRESSLER, *supra* note 68, at 266–72; GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 834–35 (1978); Dressler, *supra* note 212, at 679 n.52; Fingarette, *supra* note 131, at 106–09.

The prison escapee might also assert the separate defense of necessity, arguing that he chose the lesser of two evils by escaping. *See* MODEL PENAL CODE § 2.09 cmt. 3, at 377 (1985); DRESSLER, *supra* note 68, at 266–69; *see also* Martin R. Gardner, *The Defense of Necessity and the Right of Escape from Prison—A Step Toward Incarceration Free from Sexual Assault*, 49 S. CAL. L. REV. 110 (1975).

[238] MODEL PENAL CODE § 2.09 cmt. 3, at 377 (1985); FLETCHER, *supra* note 237, at 834.

[239] Dressler, *supra* note 212, at 679 n.52.

Notwithstanding these impediments, many courts permit inmates to submit their duress defense to the jury. Some expand the nature of the coercive threat, relaxing the required identity between crime committed and that demanded, and permitting threats of sexual assault, in addition to threats of death or serious bodily harm, to qualify for duress.[240] Other courts refuse to literally construe "imminence" to require gun-to-the-head immediacy.[241] Where an inmate's fear is based upon a pattern of prior threats and abuse, the mere passage of time between threat and escape will not preclude duress as a matter of law. Instead, the question of what constitutes "present, immediate, and impending" compulsion is treated as one of fact for the jury.[242] 'Inescapability," in the prison escape context, also often similarly hinges on the factual context, "including the [inmate's] opportunity and ability to avoid the feared harm."[243] In this regard, the probable ineffectiveness of official protection may demonstrate that the inmate lacked any *reasonable* opportunity to avoid the harm without escaping.[244]

Battered offenders may draw some obvious helpful analogies to this use

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[240] *See* People v. Harmon, 220 N.W.2d 212, 214 (Mich. Ct. App. 1974), *aff'd*, 232 N.W.2d 187 (Mich. 1975) (inmate asserted "more than generalized fear of homosexual attack"). *But see* State v. Tuttle, 730 P.2d 630 (Utah 1986) (threatened harm must be at least that which would cause substantial bodily injury); Commonwealth v. Stanley, 446 A.2d 583 (Pa. 1982) (alleged overcrowding and inadequate medical care insufficient to support duress).

[241] *See* People v. Unger, 338 N.E.2d 442 (Ill. App. Ct. 1975), *aff'd*, 362 N.E.2d 319 (Ill. 1977).

[242] *See, e.g.*, Esquibel v. State, 576 P.2d 1129, 1132–33 (N.M. 1978), *overruled on other grounds*, State v. Wilson, 867 P.2d 1175 (N.M. 1994) (passage of two to three days between threat and escape still presented jury question concerning "imminence").

[243] *Harmon*, 220 N.W.2d at 214.

[244] A number of courts will permit an inmate to establish inescapability by demonstrating either the lack of time or opportunity for complaint *or* "a history of futile complaints which make any result from such complaints illusory." People v. Lovercamp, 118 Cal. Rptr. 110, 115 (Cal. Ct. App. 1974); Amin v. State, 811 P.2d 255, 260 (Wyo. 1991).

Of course, not all courts are so willing to expand the elements of duress in the prison escape scenario. *See, e.g.*, State v. Wolf, 689 P.2d 188 (Ariz. Ct. App. 1984) (public policy requires courts to apply more stringent standard of duress in prison escape case); People v. Davis, 306 N.E.2d 897 (Ill. App. Ct. 1974) (duress not available when no imminent threat to life and person who allegedly threatened inmate did not demand that inmate escape); State v. Harding, 635 P.2d 33 (Utah 1981) (for threat to be "imminent," it must be communicated to inmate that he would be subjected to physical force presently).

of duress by prison escapees.[245] They might, for example, request that courts similarly relax the requirement that the coercive demand be for the commission of the offense and, instead, require only that their batterer's unlawful threat cause their criminal conduct. The cycle of domestic violence and pattern of prior abuse might likewise justify submitting the question of imminence to the jury in all but the clearest cases. Finally, as in the prison escape scenario, a history of futile complaints to authorities concerning an abusive partner's prior assaults, or the ineffectiveness or inaccessibility of other forms of social assistance to battered women,[246] arguably raise a triable fact issue concerning whether a battered offender had any reasonable avenue of escape.

The analogy to prison escape cases, however, may ultimately prove unhelpful to battered offenders. Even a court willing to stretch the traditional limitations on duress may impose additional restrictions similar to those often required in the prison escape scenario. In many jurisdictions, for example, an inmate must demonstrate that he used no force or violence in escaping and that he immediately attempted to surrender upon reaching a position of safety.[247] These additional prerequisites flow from the

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[245] In State v. Torres, 657 P.2d 1194 (N.M. Ct. App. 1983), for example, a New Mexico appellate court analyzed a battered offender's claim of duress by drawing upon that court's similar treatment of inmates charged with escape. In that case, the jury convicted the battered offender of purchasing a computer with a check drawn on a fictitious account. The State had argued that because the woman's abusive husband had not accompanied her into the store with his threats, the accused had failed to demonstrate the requisite "imminence." *Id.* at 1196–97. The trial court supported the State's argument with a supplemental instruction emphasizing the need for immediacy. *Id.* at 1196. In reversing the woman's conviction, the appellate court stated: "We can fathom no reason why threats need to be less immediate in prison escape cases than in other situations where duress might be a defense." *Id.* at 1197 (citing *Esquibel*, 576 P.2d 1129). The court thus held the jury entitled to consider whether the seven-year history of abuse, along with the threat of further beatings, rendered the threatened harm both present and immediate. *Id.*

[246] For a description of the limited legal and social options available to a battered woman in an abusive relationship, see Appel, *supra* note 24, at 970–74; Blake, *supra* note 24, at 74–75.

[247] *See Lovercamp*, 118 Cal. Rptr. at 115; Iowa v. Reese, 272 N.W.2d 863, 866 (Iowa 1978); Commonwealth v. Stanley, 446 A.2d 583 (Pa. 1982); State v. Tuttle, 730 P.2d 630 (Utah 1986); State v. Niemczyk, 644 P.2d 759 (Wash. Ct. App. 1982); *Amin*, 811 P.2d at 260. Courts differ on whether these additional restrictions on duress constitute prima facie elements of duress in the prison context, *id.*, or merely factors for the jury to assess in determining coercion. *See* People v. Unger, 362 N.E.2d 319 (Ill. 1977); People v. Mendoza, 310 N.W.2d 860, 862 (Mich. Ct. App. 1981); State v. Baker, 598 S.W.2d 540, 545–46 (Mo. Ct. App. 1980); Esquibel v. State, 576 P.2d

traditional unwillingness of courts to entertain inmate complaints,[248] as well as strong public interests in preserving prison discipline, preventing prison escapes, and protecting the safety of the prisoner, prison officials, and the public.[249] Arguably, they represent restrictions limited to the prison escapee and will not be applicable to the more sympathetic battered offender. If relevant, however, these additional conditions on duress may pose significant hurdles to battered offenders accused of violent offenses or of course-of-conduct crimes that continue over an extended period of time.

Moreover, many view the unavailability, inaccessibility, or ineffectiveness of official assistance as irrelevant to individual criminal responsibility—both in general,[250] and of battered women in particular.[251]

1129, 1132–33 (N.M. 1978), *overruled on other grounds*, State v. Wilson, 867 P.2d 1175 (N.M. 1994). In United States v. Bailey, 444 U.S. 394 (1980), the Supreme Court held that in order to obtain a jury instruction on duress or necessity as a defense to the continuing federal crime of prison escape, the escapee must offer evidence of "a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force." *Id.* at 413.

[248] *See, e. g.*, State v. Green, 470 S.W.2d 565 (Mo. 1971).

[249] *See* David Dolinko, Comment, *Intolerable Conditions as Defense to Prison Escapes*, 26 U.C.L.A. L. REV. 1126, 1167–81 (1979) ("guidelines represent an attempt to safeguard the strong public interest in preventing prison escapes while taking into account 'the individual dilemma' confronting a seriously treatened inmate"); Note, *The Necessity Defense to Prison Escape after* United States v. Bailey, 65 VA. L. REV. 359, 372 (1979) (additional requirements "reflect the judgment that the costs of prison escapes are justified only when escape is the single means for avoiding intolerable prison conditions"); *see also* MODEL PENAL CODE § 3.02, at 12 n.5 (1985) ("[A] court could consider whether recognition of the [necessity] defense when a prisoner has escaped to avoid assault would have the effect of substantially encouraging unjustified escapes.")

[250] *See* Dressler, *supra* note 212, at 685–86; Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 285 (1987) (both finding concept of "shared guilt" not inconsistent with that of individual responsibility). A recent proposal to codify duress in England explicitly rules it "immaterial that the person doing the act believes, or that it is the case, that any official protection available in the circumstances will or may be ineffective." Padfield, *supra* note 131, at 779 (quoting Law Commission's proposed codification of duress).

Authorities differ widely concerning this issue. Some, like Glanville Williams, argue against considering the ineffectiveness of official assistance in claims of duress. According to Williams, if a defendant could have fled or resisted a wrongdoer as a matter of undisputed fact, "there is no evidence of duress for the consideration of the jury." WILLIAMS, TEXTBOOK, *supra* note 124, at 631. While severe, such a rule aims at encouraging persons under duress to choose lawful alternatives to committing a crime. *Id.* at 631–32.

Others, in contrast, view the absence of social assistance as directly relevant to

Such a restrictive reading of inescapability would preclude battered offenders presented with an opportunity for self-help or escape from utilizing duress as a matter of law.[252]

2. *Subjectifying Reasonableness*

No matter how willing a court may be to modify the traditional elements of imminence and inescapability for a battered offender,[253] her defense of duress will likely fail, as a matter of law, unless a court is similarly willing to subjectify "reasonableness" by considering the behavioral and psychological attributes of "battered women." Indeed, this appears a primary role of the battered woman syndrome in cases of duress.

Clearly, expert testimony concerning the battered woman syndrome relates to the subjective component of a battered offender's claim of duress. As in cases of self-defense, the battered woman defense arguably dispels the common "myths and misconceptions" surrounding domestic abuse and, in so doing, bolsters the credibility of the defendant's claim that she acted

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whether a defendant had any reasonable opportunity to escape. *See, e.g.*, United States v. Contento-Pachon, 723 F.2d 691, 694 (9th Cir. 1984) (jury might find defendant had no reasonable opportunity to escape drug traffickers given defendant's belief that Bogota police were paid informants of coercers); State v. Toscano, 378 A.2d 755, 763 (N.J. 1977) (duress should recognize "predicament of individual who reasonably believes that appeals for assistance from law enforcement officials will be unavailing"); *see also* ROBINSON, *supra* note 89, § 177(e)(2), at 358 (contending that if legal or other protection is unavailable or not accessible, exercise of free will might be impaired); Padfield, *supra* note 131, at 780–81 (arguing that without such information, jury could not "accurately assess the alternative courses available to the defendant" and would "assume that official protection is available when the practicality of the situation indicated that it wasn't").

[251] *Compare* Schulhofer *supra* note 53, at 128 (author would recognize battered woman's inability to obtain help in self-defense context) *with* C.J. Rosen, *supra* note 52, at 54 (author troubled with allowing battered women to establish necessity of deadly force, absent imminent attack, because criminal justice system has failed them).

[252] *See* State v. Vanzant, No. 64010, 1993 Ohio App. LEXIS 5220, at *2 (Ohio Ct. App. Oct. 28, 1993) (holding that duress "may not be utilized" by battered offender presented with opportunity for self-help or escape when batterer imprisoned). *But see* Blake, *supra* note 24, at 75 ("Jurors need to be informed of the limited options available to battered women in order to evaluate the defendant's perceived and actual opportunity for escape.").

[253] *See* United States v. Homick, 964 F.2d 899, 905–06 (9th Cir. 1992) (recognizing that "unique nature of battered woman syndrome" may justify modification of traditional duress standards).

under duress.[254] Such testimony thus explains why a battered woman would remain in an abusive relationship and continue to commit crimes and why she failed to report either the abuse or those crimes to authorities.

Absent evidence of the objective reasonableness of her belief, however, a battered offender cannot establish a prima facie case of traditional duress. Not surprisingly, then, courts and commentators that advocate the use of duress by battered offenders all emphasize the need to admit expert testimony to establish the reasonableness of the woman's decision to commit a particular crime.[255] Such expert testimony renders reasonable what would otherwise appear unreasonable by explaining "how a battered woman might think, react, or behave."[256] Without such testimony, these authorities posit, "the abused woman may appear and act relatively normal"[257] to a jury unfamiliar with the ways in which severe abuse can alter her state of mind and distort her perception of danger and immediacy.[258] These courts and commentators additionally find the

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[254] *See* People v. Romero, 13 Cal. Rptr. 2d 332, 340–42 (Cal. Ct. App. 1992) (expert testimony bolsters credibility of battered offender's claim of duress), *vacated on other grounds*, 35 Cal. Rptr. 2d 270 (Cal. 1994); McMaugh v. State, 612 A.2d 725, 732 (R.I. 1992) (testimony concerning battered woman syndrome explains why battered woman incapable of freeing herself); *see also* Blake, *supra* note 24, at 69 (testimony concerning battered woman syndrome "equally relevant to support the credibility of a battered woman and assess the defense of duress"); Boland, *supra* note 24, at 625–27 (expert testimony related to battered offender's credibility and state of mind); Gousie, *supra* note 24, at 480 (expert testimony necessary to dispel myths and help jury decide whether defendant possessed the requisite criminal intent).

[255] *See Romero*, 13 Cal. Rptr. 2d at 339 (expert testimony used to explain behavior patterns that might otherwise appear unreasonable); State v. Riker, 869 P.2d 43, 54 (Wash. 1994) (en banc) (Utter, J., dissenting) (expert testimony explains whether defendant acted under reasonable apprehension of harm given effects of past abuse); *see also* Blake, *supra* note 24, at 80–82 (advocating use of battered woman syndrome testimony to establish battered offender's reasonable belief of imminent danger); Boland, *supra* note 24, at 627 (finding evidence of past abuse "informative on the totality of the circumstances in which the defendant finds herself when faced with such a choice"); Magner, *supra* note 24, at 447 (explaining that expert testimony concerns "what would be expected of women generally . . . who should find themselves in a (comparable) domestic situation").

[256] *Romero*, 13 Cal. Rptr. 2d at 341.

[257] *McMaugh*, 612 A.2d at 733.

[258] *Riker*, 869 P.2d at 54 (Utter, J., dissenting) (expert testimony explains how severe abuse distorts perception of harm and its immediacy in ways not readily understandable); Boland, *supra* note 24, at 625–26 (defendant's altered perception of danger and imminence is as relevant to duress as it is to self-defense); Magner, *supra* note 24, at 446 (battered woman syndrome establishes how battered woman's reactions

battered woman defense relevant to reasonableness in that it demonstrates how prior abuse can render a battered offender more susceptible to future threats of violence[259] and incapable of handling "situations in the way ordinary people would."[260]

As previously indicated, however, courts generally measure duress against the standards of a person of reasonable moral fortitude. Ordinarily, an actor's "situation" does not encompass individual psychological characteristics that heighten an actor's susceptibility to threats, distort her perception of imminence, or disable her from escaping.[261] Yet, the battered woman defense directly aims at establishing such psychological traits and mental characteristics. Thus, in order to find such testimony relevant to reasonableness, courts must partially infuse the objective standard of duress with the psychological make-up of battered women. While not completely subjective (*i.e.*, based on the individual perceptions and fortitude of a particular defendant), this modified standard implicitly assesses duress from the perspective of the reasonable battered offender.[262]

C. *Evidentiary Reform and the Battered Woman Defense*

Some who advocate the use of duress in defense of battered offenders urge the "feminist community" to "lobby for statutory additions and amendments to make expert testimony on [the battered woman syndrome]

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and responses differ from those which might be expected).

[259] *See Riker*, 869 P.2d at 50 (defense expert testimony sought to establish that defendant's "history of abuse built a cumulative patina of fear which resulted in her inability to resist or escape . . . alleged coercion"); Boland, *supra* note 24, at 626–27 (testimony establishes that battered woman's "ability to resist was precipitously low to begin with").

[260] Magner, *supra* note 24, at 446. *See also Riker*, 869 P.2d at 56 (Utter, J., dissenting) (battered woman assesses "danger differently than would an ordinary person").

[261] *See* United States v. Johnson, 956 F.2d 894, 902–03 (9th Cir. 1992) (battered woman's "special subjective vulnerability" and lack of "psychological freedom to end her victimization without assistance' does not establish inescapability required for complete duress); *see also supra* notes 192–209 and accompanying text.

[262] *See* Boland, *supra* note 24, at 632 (arguing that threat "as it is perceived by the defendant" must be fully explained to jury); Magner, *supra* note 24, at 447 (assessing reasonableness from perspective of women "who should find themselves in a (comparable) domestic situation"). For a discussion of whether such a subjectification of duress comports with the rationale of duress as an excuse, see *infra* notes 310–334 and accompanying text.

admissible" in support of duress.[263] Several states have recently attempted to codify the admissibility of the battered woman defense.[264] Only a few of these statutes, however, are currently broad enough to encompass cases where a battered offender asserts duress.[265] Instead, most of these legislative reforms restrict their applicability to cases involving self-defense,[266] homicide,[267] or "the use of force against another."[268] Such

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[263] Blake, *supra* note 24, at 92.

[264] *See* CAL. EVID. CODE § 1107 (Deering Supp. 1994); GA. CODE ANN. § 16-3-21 (Supp. 1993); LA. CODE EVID. ANN. art. 404 (West 1994); MD. CODE ANN. CTS. & JUD. PROC. § 10-916 (Supp. 1993); MASS. GEN. LAWS ANN. ch. 233, § 23E (West 1994); MO. ANN. STAT. § 563.033 (Vernon Supp. 1994); OHIO REV. CODE ANN. § 2901.06 (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 40.7 (West 1992); TEX. PENAL CODE ANN. § 19.06 (West Supp. 1994); WYO. STAT. § 6-1-203 (1993).

[265] The Massachusetts evidence code explicitly mandates the admissibility of expert testimony concerning the battered woman syndrome "[i]n the trial of criminal cases charging the use of force against another where the issue of . . . duress or coersion [sic] . . . is asserted." MASS. GEN. LAWS ANN. ch. 233, § 23E (West 1994). Though the California statute concerning the battered woman syndrome does not explicitly mention duress, California courts have construed it broadly to apply to "any criminal case." People v. Romero, 13 Cal. Rptr. 2d 332, 338 n.9 (Cal. Ct. App. 1992), *vacated on other grounds*, 833 P.2d 388 (Cal. 1994). *See generally* Scott Gregory Baker, *Deaf Justice?: Battered Women Unjustly Imprisoned Prior to the Enactment of Evidence Code Section 1107*, 24 GOLDEN GATE U. L. REV. 99 (1994). The language of the Oklahoma statute is similarly broad enough to encompass cases of duress. *See* OKLA. STAT. ANN. tit. 22, § 40.7 (West 1992) ("[i]n an action in a court of this state").

[266] GA. CODE ANN. § 16-3-21 (Supp. 1993) (use of force in defense of self or others); LA. CODE EVID. ANN. art. 404 (West 1994) ("when the accused pleads self-defense"); MD. CODE ANN. CTS. & JUD. PROC. § 10-916 cmt. (Supp. 1993) (when "offered in support of the state of mind element of perfect or imperfect self-defense"); MO. ANN. STAT. § 563.033 (Vernon Supp. 1994) ("admissible upon the issue of whether the actor lawfully acted in self-defense or defense of another"); OHIO REV. CODE ANN. § 2901.06 (Anderson 1993) (if accused "raises the affirmative defense of self-defense"); TEX. PENAL CODE ANN. § 19.06 (West Supp. 1994) ("if a defendant raises as a defense a justification"); WYO. STAT. § 6-1-203 (1993) ("and the person raises the affirmative defense of self-defense").

[267] GA. CODE ANN. § 16-3-21 (Supp. 1993) ("[i]n a prosecution for murder or manslaughter"); MD. CODE ANN. CTS. & JUD. PROC. § 10-916 (Supp. 1993) (available to defendant charged with commission or attempted commission of "[f]irst degree murder, second degree murder, manslaughter, maiming, or . . . [a]ssault with intent to murder or maim"); TEX. CODE CRIM. PROC. ANN. art. 38.36 (West 1994) ("[i]n a prosecution for murder or manslaughter").

[268] *See, e.g.*, OHIO REV. CODE ANN. § 2901.06 (Anderson 1993); WYO. STAT. §6-1-203 (1993). Even the Massachusetts statute which expressly includes duress

statutes often further limit the purposes for which expert testimony may be admitted.[269] Thus, while these legislative efforts ostensibly aim at protecting battered women by facilitating the admission of expert testimony concerning the battered woman syndrome, they might actually argue against admission of such testimony in cases of duress.[270]

D. *Duress and Sentencing*

A court unwilling to dispense with the imminence or inescapability requirements of traditional duress, or to import the special subjective vulnerabilities of battered women into its objective benchmark, may nevertheless find duress relevant to a battered offender's blameworthiness.[271] While these courts do not consider the subjective,

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limits its ambit to cases "charging the use of force against another." MASS. GEN. LAWS ANN. ch. 233, § 23E (West 1994).

[269] GA. CODE ANN. § 16-3-21 (Supp. 1993) ("in order to establish the defendant's reasonable belief that the use of force or deadly force was immediately necessary"); MD. CODE ANN. CTS. & JUD. PROC. § 10-916 (Supp. 1993) ("for the purpose of explaining the defendant's motive or state of mind"); OHIO REV. CODE ANN. § 2901.06 (Anderson 1993) ("to establish the requisite belief of an imminent danger of death or great bodily harm"); TEX. CODE CRIM. PROC. ANN. art. 38.36 (West 1994) ("to establish the defendant's reasonable belief that use of force or deadly force was immediately necessary"); WYO. STAT. § 6-1-203 (1993) ("to establish the necessary requisite belief of an imminent danger of death or great bodily harm").

Professor Holly Maguigan criticizes such statutory limits on the scope of expert testimony as potentially excluding evidence "on state of mind, on myths and misconceptions, and on the question why the defendant did not leave the abusive relationship." Maguigan, *supra* note 52, at 455. Maguigan believes it unwise to legislatively define the permissible content of expert testimony by codifying some type of diagnostic checklist for the syndrome. *Id.* at 455–56 & n.281. Instead, Maguigan contends that expert testimony concerning the syndrome "should be admissible in all cases, civil and criminal, in which an explanation of the state of mind of a party or witness is otherwise relevant and admissible." *Id.* at 456–57.

[270] In State v. Baker, No. 13-91-46, 1992 Ohio App. LEXIS 3745 (Ohio Ct. App. July 16, 1992), for example, the Ohio Court of Appeals held that legislative recognition of the battered woman syndrome in cases of self-defense did not establish a general rule of admissibility in cases of duress. *See also* Blake, *supra* note 24, at 91 (describing many recent legislative responses as "laudable but ultimately inadequate, and possibly detrimental"); *Developments*, *supra* note 34, at 1593 (indicating that "current legislation in some states may place new limits on a battered woman's legal options by imposing new restrictions on the use and purpose of syndrome testimony").

[271] *See* United States v. Gaviria, 804 F. Supp. 476, 480 (E.D.N.Y. 1992) (noting that battered offender's "status as a victim of systematic physical and emotional abuse

"incomplete" duress experienced by many battered offenders sufficient to excuse,[272] they may consider it relevant in sentencing.[273]

"[L]egal standards are more subjective and less strict" in sentencing than in adjudging criminal liability.[274] In sentencing, courts are not confined to the classical definition of duress and routinely relax or entirely jettison its traditional elements.[275] Thus, a defendant subjected to threats

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substantially lessens her blameworthiness, notwithstanding her legal guilt").

[272] Sir James Stephen argued that duress should never constitute a defense to criminal liability, but instead, should function only in mitigation of punishment. 2 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 107–08 (1883) ("[Co]mpulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it may and ought to operate in mitigation of punishment in most but not all cases.). Several contemporary scholars continue to view duress as relevant only to mitigation of punishment. *See* Bayless, *supra* note 131, at 1214 (finding duress analogous to provocation in that it should mitigate only); Peiris, *supra* note 131, at 208 (arguing that conception of duress as "mitigatory, rather than exculpatory" is "cogently defensible"); Wasik, *supra* note 131, at 457–58 (contending that while motive irrelevant in assessing guilt, it becomes proper consideration at sentencing).

Today, however, most authorities agree that the criminal law should not hold a person caught in a coercive dilemma to a standard of heroism to which her judges themselves would not be prepared to submit. *See* MODEL PENAL CODE § 2.09 cmt. 2, at 374–75 (1985) ("hypocritical" not to excuse); WILLIAMS, GENERAL, *supra* note 124, at 755 (purely mitigatory view of duress "over-severe"). A successful defense of duress (*i.e.*, "complete duress") will thus completely exculpate an accused of all criminal liability. In contrast, "incomplete duress" will only mitigate punishment.

[273] Even in "guideline" jurisdictions where sentencing is less discretionary and more determinate, "incomplete" duress or coercion will often function in mitigation of punishment. The Federal Sentencing Guidelines, for example, expressly permit a downward departure from the applicable sentencing range if a defendant "committed the offense because of *serious coercion*, . . . *or duress*, under circumstances not amounting to a complete defense." U.S.S.G. § 5K2.12 (Supp. 1995) (emphasis added). For a helpful overview of the framework and operation of the Federal Sentencing Guidelines, see John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines*, 59 BROOK. L. REV. 551 (1993). State sentencing regimes often contain similar "coercion" provisions. *See* State v. Pascal, 736 P.2d 1065, 1070 (Wash. 1987) (en banc) (discussing Washington's Sentencing Reform Act).

[274] *Gaviria*, 804 F. Supp. at 479.

[275] In permitting a downward departure in a battered offender's sentence based upon incomplete duress, the Ninth Circuit, in *Johnson*, noted "that the injury threatened need not be imminent and may include injury to property, and there need not be proof of inability to escape." United States v. Johnson, 956 F.2d 894, 898 (9th Cir. 1992). *See also* United States v. Cheape, 889 F.2d 477, 480 (3d Cir. 1989)

less serious than death or serious bodily injury, or that concern future harm, rather than imminent harm, might argue that such "incomplete duress," while insufficient to excuse, nevertheless justifies a lesser punishment than that accorded one not similarly coerced.[276]

Moreover, "purely subjective" factors otherwise irrelevant to guilt may be taken into account in sentencing, where a court can "properly consider the individual before the court and her particular vulnerability."[277] Thus, a battered offender's subjective perception of danger,[278] her individual evaluation of the opportunity to escape,[279] her "psychological makeup,"[280] and her particular susceptibility to "patterns of dependence, domination and victimization,"[281] while arguably irrelevant to her culpability,[282] may be utilized in affixing her sentence.[283]

(acknowledging broader standard of coercion as sentencing factor than that required to prove a complete defense). Courts similarly often relax or eliminate the elements of self-defense in sentencing battered women convicted of killing their batterers. *See, e.g.*, United States v. Whitetail, 956 F.2d 857, 863 (8th Cir. 1992); *Pascal*, 736 P.2d at 1072.

[276] *See, e.g.*, *Johnson*, 956 F.2d at 898 (both defendants who failed to persuade jury of duress and defendant properly denied instruction on duress entitled to assert coercion in sentencing); United States v. Gaviria, 804 F. Supp. 476, 479–81 (E.D.N.Y. 1992) (defendant who could not satisfy the objective standard of duress entitled to downward departure of sentence); State v. Riker, 869 P.2d 43, 47 (Wash. 1992) (en banc) (battered offender who failed to convince the jury of duress sentenced at lowest end of standard range).

[277] *Johnson*, 956 F.2d at 898–99. *See also* United States v. Willis, 38 F.3d 170, 176 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 2585 (1995) (distinguishing between criminal liability and criminal sentencing where court not limited to objective duress formulation); MODEL PENAL CODE § 2.09 cmt. 2, at 374 (1985) ("The most that it is feasible to do with lesser [subjective] disabilities is to accord them proper weight in sentencing.").

[278] *Johnson*, 956 F.2d at 898.

[279] *Id.* at 898, 903.

[280] *Id.* at 900.

[281] *Gaviria*, 804 F. Supp. at 479; *see also* United States v. Smith, 987 F.2d 888, 891 (2d Cir.) (testimony that defendant unusually vulnerable relevant to sentencing), *cert. denied*, 114 S. Ct. 209 (1993); United States v. Johnson, 956 F.2d at 899, 903 (9th Cir. 1992) (trial court free to consider subjective vulnerability of battered women in determining "incomplete duress"); *Riker*, 869 P.2d at 51 n.5 (cumulative fear that made battered offender unable to escape or resist coercion more appropriately considered at sentencing).

[282] *See supra* notes 192–209 and accompanying text.

[283] The Federal Sentencing Guidelines so subjectify duress: "The extent of the decrease [for serious coercion or duress] ordinarily should depend on the

Relegation of duress to sentencing, however, will not completely circumvent the obstacles experienced by many battered offenders. The current sentencing regime in many jurisdictions dramatically circumscribes judicial discretion in sentencing.[284] In addition, the "serious coercion" sufficient to merit a reduction in sentence may be limited to physical coercion and thus fail to account for the "endemic sociological and psychological realities" of male dominance, female victimization, and emotional abuse that characterizes the battered woman defense.[285]

Even when permitted to depart from applicable guidelines because of duress or coercion, courts may find themselves further hamstrung by legislative mandatory minimum sentences.[286] Thus, courts that admittedly

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reasonableness of the defendant's actions and on the extent to which the conduct would have been less harmful *under the circumstances as the defendant believed them to be.*" U.S.S.G. § 5.K2.12., policy stmt. (Supp. 1995) (emphasis added). *See also Johnson*, 956 F.2d at 898 (guidelines allow court to consider the "perception of the particular defendant").

[284] Under the ostensibly gender neutral Federal Sentencing Guidelines, for instance, federal courts cannot ordinarily consider an accused's sex or family responsibilities in determining whether to depart from the applicable sentencing range. *See generally* Raeder, *supra* note 37.

[285] In *Gaviria*, Judge Weinstein noted that a "subservient" defendant "might not be able to show the sort of 'serious coercion . . . or duress' of which the Guidelines speak, yet still might establish a pattern of dependence that would be relevant to blameworthiness and her sentence." United States v. Gaviria, 805 F. Supp. 476, 479 (E.D.N.Y. 1992). *See also* Raeder, *supra* note 37, at 973 (contending that "[o]nly if judges can move beyond coercion to dominance in considering departures will culpability questions be dealt with in a way that recognizes the gendered nature of some female crime"); Nagel & Johnson, *supra* note 38, at 211 (noting inability of Sentencing Commission to articulate express adjustment for crimes caused by "some form of dominance or manipulation, falling short of physical abuse or serious physical coercion"); Henry Wallace & Shanda Wedlock, *Federal Sentencing Guidelines and Gender Issues: Parental Responsibilities, Pregnancy and Domestic Violence*, 2 SAN DIEGO JUSTICE J. 395, 423 (1994) (arguing for modification of Guidelines to permit departure "in cases where only emotional abuse was previously present").

[286] The Guidelines explicitly defer to conflicting statutorily prescribed sentences. *See* U.S.S.G. § 5.G1.1(a) (Supp. 1995) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."). *See generally* William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405 (1992). A district court may depart from the mandatory minimum sentence of the Guidelines only in cases in which the accused provides substantial assistance in the prosecution of another and upon Government motion. 18 U.S.C. § 3553(e); *see also* United States v. Valente, 961 F.2d 133, 135 (9th Cir. 1992) (no discretion to depart downward from mandatory minimum sentence

view battered offenders as less deserving of punishment, and less in need of deterrence or incapacitation,[287] might be precluded from translating those sentiments into practice.[288]

Finally, many courts fail to exercise their authorized discretion in sentencing battered offenders. Although permitted to consider the battered woman syndrome and the coercion exerted upon battered offenders, many courts appear no more able than jurors to shirk the "myths" and "misconceptions" surrounding domestic violence, even in connection with sentencing.[289]

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based on defendant's "aberrant behavior"); *Gaviria*, 804 F. Supp. at 480 (court lacks power to reduce sentence "where Congress' own pronouncements speak definitively on the length of a defendant's sentence").

[287] *See, e.g.*, *Gaviria*, 804 F. Supp. 478–79 (asserting that incarceration of battered women is incompatible with the purposes of punishment). *See also* Appel, *supra* note 24, at 978 (maintaining that punishment of battered offender "serves no moral purpose"); Moyer, *supra* note 37, at 206 (noting that there is a "consensus . . . among most researchers that most women in prison are not dangerous and that criminal justice system should be seeking alternative policies and programs for handling these less-serious women offenders"); Raeder, *supra* note 37, at 930 (citing lower recidivism rates for women and fact that average incarcerated female is not a dangerous offender).

[288] In *Gaviria*, Judge Weinstein regretted that he had "no power to consider the injustice of minimum terms in individual cases," and thus sentenced the "subservient, abused" defendant in that case to the statutory minimum of five years imprisonment. *Gaviria*, 804 F. Supp. at 480–81. As previously noted, many attribute the dramatic increase in the female prison population to such mandatory minimum sentences for drug offenses. *See supra* note 41 and accompanying text.

[289] In *Neelley*, for example, the trial court had sentenced the defendant to death, notwithstanding testimony that she was a "severely battered woman," and notwithstanding the jury's recommendation of life without parole. *See* Neelley v. State, 642 So. 2d 494, 508. (Ala. Crim. App. 1985), *writ quashed as improvidently granted*, 642 So. 2d 510 (Ala. 1994), *cert. denied*, 115 S. Ct. 1316 (1995). In concluding that the husband's influence did not constitute extreme duress or substantial domination, the trial court stated:

> The defendant is an intelligent person capable of making independent choices. The evidence is substantial that she made a willing choice to follow her husband's influence rather than to depart from it. There were numerous opportunities for the defendant to break with her husband and seek help had she felt the need or been so inclined.

Neelley v. State, 494 So. 2d 669, 693 (Ala. Crim. App. 1985), *aff'd*, 494 So. 2d 697 (Ala. 1986), *cert. denied*, 480 U.S. 926 (1987), *denial of post conviction relief aff'd*, 642 So. 2d 494 (Ala. Crim. App. 1993), *writ quashed as imporvidently granted*, 642

VI. DURESS, SELF-DEFENSE, AND THE BATTERED OFFENDER

Absent legislative reform, then, battered offenders must either convince a court to implicitly modify duress by subjectifying its traditional elements or consign duress for use in connection with their sentencing. Advocates of battered offenders, who obviously prefer the former alternative,[290] often urge extending the vehicle for such implicit modification -- the battered woman defense--beyond self-defense to cases of alleged coercion.[291] The apparent overlap in the prima facie elements of imminence, necessity, and reasonableness, they contend, make self-defense and duress "patently similar in all relevant aspects" and the battered woman defense thus "easily transferable" to the context of duress.[292] As shown below, however, the different natures of self-defense and duress, as well as the additional moral

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So. 2d 510 (Ala. 1994), *cert denied*, 115 S. Ct. 1316 (1995). *See also* People v. Smith, 608 N.E.2d 1259, 1271 (Ill. App. Ct. 1993) (in sentencing battered mother to 60 years imprisonment, trial court weighed the brutal and heinous nature of the crime over the fact that the defendant was under the influence of her husband and suffered from the battered woman syndrome).

[290] As noted by the Ninth Circuit in *Johnson*, "if the defense were 'complete,' there would have been no crime requiring a sentence." United States v. Johnson, 956 F.2d 894, 898 (9th Cir. 1992).

[291] Appel, *supra* note 24, at 980; Blake, *supra* note 24, at 77–84; Gousie, *supra* note 24, at 454–55.

[292] Blake, *supra* note 24, at 69; *see also* Appel, *supra* note 24, at 980 (contending that battered woman syndrome "equally applicable in duress defenses" as in self-defense because it "fulfills the same elements . . . in both defenses"); Boland, *supra* note 24, at 625–26 (finding "no reason why the defendant's perception, altered through a cycle of battering, of the imminence of the threat should be any less informative in a case of coerced conduct than where the defendant acted in self-defense").

At least one court has found this overlap in elements similarly convincing:

> With the two defenses thus juxtaposed, it is clear that a rule permitting expert testimony about [battered woman syndrome] in a self-defense case must necessarily permit it in a case where duress is claimed as a defense. In both cases, the evidence is relevant to the woman's credibility and to support her testimony that she entertained a good-faith objectively reasonable and honest belief that her act was necessary to prevent an imminent threat of greater harm.

People v. Romero, 13 Cal. Rptr. 2d 332, 339 (Cal. Ct. App. 1992), *vacated on other grounds*, 833 P.2d 388 (Cal. 1994). *See also* State v. Riker, 869 P.2d 43, 54 (Wash. 1994) (en banc) (Utter, J., dissenting) (persuaded by similarity in two defenses).

claims at issue in duress, preclude such ready correspondence.

A. *Self-Defense and Duress: Overlap of Elements*

Though jurisdictional differences in the formulations of duress and self-defense make any comparison of the two defenses quite difficult, both arguably do contain parallel elements. Both duress and self-defense, for example, require a certain temporal proximity of harm.[293] Likewise, both defenses require that a defendant's conduct be "necessary."[294] It is the overlap in the subjective elements of the two defenses, however, that presents the strongest argument for extending the battered woman defense to non-traditional cases of duress.

Evidence of past abuse, including expert testimony concerning the battered woman syndrome, explains how a battering relationship affects a battered woman's subjective perception of imminence and necessity. Such testimony aids in establishing a battered woman's mental state and in bolstering her credibility, whether at issue in self-defense or duress.[295] Thus, if duress were an entirely subjective defense, the battered woman defense would clearly justify submission of that defense to the jury.

The successful assertion of both self-defense and duress, however,

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[293] Jurisdictions, however, are likely to more strictly construe this temporal prerequisite and require "immediacy," as opposed to broader "imminence," in the context of duress. *See, e.g.*, *Riker*, 869 P.2d at 51 ("Unlike self-defense, which only requires an apprehension of 'imminent' danger, our duress statute requires an apprehension of 'immediate' harm."); *see also supra* notes 161–72 and accompanying text.

[294] In self-defense, this means that deadly force must be necessary to avert an aggressor's imminent attack. *See supra* notes 89–91 and accompanying text. In duress, necessity mandates that a defendant have no reasonable opportunity to escape an imminent deadly threat without violating the law. *See supra* notes 186–191 and accompanying text. While courts rigidly enforce the inescapability requirement in duress, the majority of jurisdictions in this country fail to take necessity to its logical conclusion in self-defense. Most jurisdictions, for example, do not require a defendant to retreat in the face of an imminent unlawful attack, even if she is aware of a completely safe avenue of escape, before using deadly force in self-defense. *See supra* note 91.

[295] *See* Blake, *supra* note 24, at 69 ("the use of [battered woman syndrome] testimony is equally relevant to support the credibility of a battered woman asserting the defense of duress as for a battered woman claiming self-defense"); Boland, *supra* note 24, at 626–27 (need to admit "evidence of past abuse" to assess battered woman's credibility and subjective apprehension of danger "virtually identical" in cases of duress and self-defense).

generally requires that a battered woman also demonstrate the "objective reasonableness" of her subjective belief.[296] Whether she can satisfy that objective standard, in turn, depends on the court's willingness to individualize and contextualize it with the behavioral and psychological characteristics of the "paradigmatic" battered woman. The question then becomes whether the underlying rationale of duress itself will permit such modification. This issue, in turn, requires an examination of the inherent nature of duress as a defense to criminal liability; an investigation of why we excuse coerced actors in the first place. Given its underlying rationale, as discussed below, duress cannot appropriately be modified to the extent necessary to accommodate the battered woman defense in many non-traditional cases of coercion.

B. *The Rationale of Duress*

Duress as a defense to criminal culpability dates back to the ancient Hebrews and has occupied a place in the common law for well over two-hundred years.[297] Despite its pedigree, the underlying rationale, classification, and scope of duress has generated extensive debate both in this country and abroad.[298]

1. *Duress as Negating Element of Offense*

The mentalistic idiom utilized by courts and commentators when discussing duress accounts for much of the confusion over its rationale.[299] Commentators who advocate the use of duress in defense of battered offenders, for example, frequently describe the coerced offense as an "involuntary" act of one whose "free will" has been "overborne" and who thus no longer acts according to her own choices and desires.[300] Such portrayals, however, misleadingly suggest that coercion negates either the

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[296] This would not be the case in jurisdictions that adhere to the Model Penal Code's entirely subjective formulation of self-defense. *See supra* note 72. *But see* MODEL PENAL CODE § 2.09 (1985) (retaining objective standard for duress).

[297] *See* Rosenthal, *supra* note 131, at 200-01.

[298] Commonwealth courts and scholars appear particularly preoccupied with the duress defense. See id. at 182; *see also* Horder, *supra* note 131; Magner, *supra* note 24; Padfield, *supra* note 131; Peiris, *supra* note 131; Wasik, *supra* note 131.

[299] Fingarette, *supra* note 131, at 71.

[300] *See, e.g.*, Gousie, *supra* note 24, at 476-77, 481 (describing battered offender as one whose conduct is "not done voluntarily," who acts "without free will," and whose behavior results from "intimidation," rather than her own desires and choices).

actus reus or the mens rea elements of an offense.[301]

The "involuntary" actor exercises no choice over her actions. She completely lacks the ability to control her behavior or to avoid committing the offense.[302] A coerced actor, in contrast, does retain some choice over her conduct. Though the opportunity to exercise such choice may be significantly impaired, she remains able to control her actions and resist the coercion.[303] Thus, a coerced act is "involuntary" only in the metaphorical sense of the word[304] and will not negate the actus reus of a crime.[305]

Nor does coercion necessarily negate the mens rea of an offense.[306] In the typical case of duress, the actor intentionally chooses to commit her crime. Her options might be painfully limited, but the coerced actor retains her free will. While she may not desire to commit the crime, she does intend to disobey the law as a means of escaping the threatened harm.[307]

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[301] *See* LAFAVE & SCOTT, *supra* note 70, § 5.3(a), at 433; WILLIAMS, TEXTBOOK, *supra* note 124, at 624–25; Wasik, *supra* note 131, at 453–55.

[302] Criminal liability generally requires the commission of a "voluntary" act. *See* MODEL PENAL CODE § 2.01(1) (1985) (criminal liability must be "based on conduct which includes a voluntary act"). Few actions, however, are sufficiently "involuntary" to negate the actus reus of an offense. *See, e.g., id.*, § 2.01(2) (involuntary conduct includes "a reflex or convulsion," "a bodily movement during unconsciousness or sleep," "conduct during hypnosis," or any similar bodily movement "that otherwise is not a product of the effort or determination of the actor, either conscious or habitual").

[303] As recognized long ago by Aristotle: "[A]n individual may resist the threat and suffer the evil rather than do what he thinks to be wrong; he will then be praised, and his resistance will show that it was not inevitable that a person should submit to the threat." ARISTOTLE, NICOMACHEAN ETHICS, Book 3, ch. 1, *quoted in* WILLIAMS, TEXTBOOK, *supra* note 124 at 625.

[304] *See* Kadish, *supra* note 250, at 266 (discussing metaphorical voluntarism underlying duress).

[305] *See* PERKINS & BOYCE, *supra* note 121, at 1054–55; ROBINSON, *supra* note 89, § 177(b), at 351; Bayless, *supra* note 131, at 1193–94; Carr, *supra* note 131, at 174–79; Fingarette, *supra* note 131, at 71–75; Wasik, *supra* note 131, at 454.

[306] As previously discussed, the existence of duress *can* negate mens rea, particularly the specific intent portion of an offense. *See supra* note 160; *see also* Rosenthal, *supra* note 131, at 202–08 (reminding that courts should not foreclose possibility that duress might negate mens rea).

[307] Professor Joshua Dressler, upon whose many works on duress this Article extensively draws, explains:

> [T]he coerced actor *chooses* to violate the law. He chooses to commit the criminal offense rather than to accept the threatened consequences. He would not have chosen to commit the crime but for the threat, but it *is* still his choice, albeit a

Thus, it is incorrect to view battered offenders under duress as lacking free will or acting involuntarily. Likewise, the duress exerted upon battered offenders generally will not deprive them of criminal intent.[308] Instead, although their choices may be "excruciatingly difficult" and their actions "unwilling," battered offenders possess free will, know they are committing a crime, and act voluntarily.[309]

2. *Duress as Normative Defense*

A person who acts under duress accurately perceives the nature and consequences of her conduct, as well as appreciates its wrongfulness.[310] The coerced actor is a normal person, unafflicted by any internal incapacity and able to alternatively choose a lawful course of action.[311] The law nevertheless excuses the coerced actor because external, abnormal circumstances for which she is not responsible (*i.e.*, the coercive threat) unfairly restrict her opportunity to act lawfully.[312] Unlike defenses such as

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hard and excruciatingly difficult choice. His act may be unwilling, but it is not unwilled.

Dressler, *supra* note 131, at 1359–60. *See also* WILLIAMS, GENERAL, *supra* note 124, at 751 (accused's motive for committing crime does not negate her will or fact that she has a choice); Fingarette, *supra* note 131, at 111 (coercion "is not merely working one's will upon another, but wrongfully working one's will through the will of the other"); Wasik, *supra* note 131, at 455 ("[T]hat the accused does not really desire the consequences for their own sake, but does desire them as a means of escape from imminent peril" is irrelevant to whether she possesses mens rea).

[308] *But see* State v. Lambert, 312 S.E.2d 31, 35 (W. Va. 1984) (defendants "[are] entitled to present evidence . . . such . . . as battered spouse syndrome, which go[es] to negate criminal intent ").

[309] *See* United States v. Johnson, 956 F.2d 894, 901 (9th Cir. 1992) (improper to equate "voluntary" with "absence of duress"); United States v. Sebresos, No. 91-10193, 1992 U.S. App. LEXIS 17757, at *6 (9th Cir. July 22, 1992) (battered woman cannot claim that acts were involuntary); United States v. Gaviria, 804 F. Supp. 476, 481 (E.D.N.Y. 1992) (battered woman knew she was committing crime and "chose to exercise whatever free will she had to act criminally").

[310] Dressler, *supra* note 131, at 1359–60; Dressler, *supra* note 212, at 702; Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 222–24 (1982).

[311] ROBINSON, *supra* note 89, § 177(e)(3), at 354; Dressler, *supra* note 212, at 684.

[312] *See* Joshua Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 MINN. L. REV. 335, 345–46, 351–52 (1979); Dressler, *supra* note 212, at 702–12; Dressler, *supra* note 131, at 1365–66; Kadish, *supra* note

insanity or involuntary intoxication that excuse an actor based on individual inadequacies, duress excuses a coerced actor because she "show[s] [her]self [to be] no different than the rest of us."[313]

Duress thus differs from other excuses[314] in that it possesses a normative component. In order to merit excuse via the defense of duress, an actor must demonstrate the level of fortitude that society can legitimately expect of one under similar coercive circumstances. As Professor Dressler explains, the "excusing process [under duress] involves a normative judgment about the degree to which people may fairly be expected to apply their capacities in the defendant's immediate circumstances."[315] Duress excuses the coerced actor "only if he attained or reflected society's legitimate expectations of moral strength."[316]

250, at 259; Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1132 (1985).

Some commentators view duress in terms of a relative incapacity or impairment of control. *See* Robinson, *supra* note 310, at 221–22, 225–26. The Model Penal Code similarly focuses on the "incapacity" of the coerced actor. *See* MODEL PENAL CODE § 2.09 (1985) (whether "a person of reasonable firmness in [the actor's] situation would have been *unable* to resist") (emphasis added).

In contrast, Professor Dressler believes that while coercion can incapacitate, the defense of duress focuses, instead, on lack of fair opportunity, rather than on any incapacity, to choose. *See* Dressler, *supra* note 131, at 1352 n.134, 1365–66; Dressler, *supra* note 212, at 707–10. This latter view of duress as based on a lack of opportunity appears more accurate, given the objective, normative component of the defense. Indeed, the Model Penal Code acknowledges that the "incapacity" that counts in duress is not the subjective incapacity of the actor, but the "incapacity of men in general to resist coercive pressure." *See* MODEL PENAL CODE § 2.09 cmt. 2, at 374 (1985); *see also* ROBINSON, *supra* note 89, § 177(c)(1), at 353.

313 Kadish, *supra* note 250, at 262. Professor Kadish classifies duress as a "reasonable volitional deficiency" defense, as compared to insanity, which he categorizes as a defense of "non-responsibility." While the coerced actor is indistinguishable from the "common run of human kind," the insane actor is very different from the rest of us." *Id.* at 262, 266. Professor Dressler expresses similar sentiments by describing duress as a "there but for the grace of God or good fortune" defense. Dressler, *supra* note 212, at 683. Unlike the insane actor, Dressler finds, the coerced actor is "whole" and "free of sickness." Dressler, *supra* note 131, at 1359–60. *See also* Fingarette, *supra* note 131, at 94 (duress focuses on the reasonableness of the victim's response to a wrongful threat not on whether "some psychological power of victim's mind was destroyed or crippled").

314 Scholars differ as to whether duress constitutes a justification or an excuse. *See infra* notes 325–38 and accompanying text.

315 Dressler, *supra* note 212, at 702.

316 Dressler, *supra* note 131, at 1334. *See also id.* at 1385 (actor lacks fair

Given this normative aspect, duress will not excuse based solely upon an actor's subjective incapacity to resist a coercive threat.[317] Nor will any minimal restriction on an actor's opportunity to choose lawful conduct suffice.[318] Instead, what entitles the coerced actor to an excuse is the reasonableness of her response to the external abnormal circumstances to which she is subjected.[319] The coercive threat must be sufficiently grave and severe as to similarly coerce a non-heroic, but reasonably firm, person into criminal conduct.[320]

The battered woman defense, as currently formulated, runs contrary to this normative aspect of duress. Although feminist scholars emphasize the need to view a battered woman's actions as reasonable, the battered woman

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opportunity "if a person of reasonable moral strength cannot fairly be expected to resist the threat"); DRESSLER, *supra* note 68, at 262 (duress excuses "as long as an actor's ordinary and expectable conduct demonstrates no more than human frailty"); ROBINSON, *supra* note 89, § 177(c)(2), at 353 (normative standard of duress assures that actor's level of resistance meets the community's standards for blamelessness . . . ."); Dressler, *supra* note 212 at 710 (duress represents normative, rather than empirically verifiable judgment about personal responsibility).

[317] ROBINSON, *supra* note 89, § 177(c)(3), at 354–55. Such subjective coercion is nevertheless an essential component of the defense. *See supra* note 192.

[318] Dressler, *supra* note 131, at 1365–66.

[319] These abnormal circumstances are what distinguish the otherwise "normal" coerced actor from other members of the general community. *See* ROBINSON, *supra* note 89, § 177(c)-(e), at 353–55; Dressler, *supra* note 212, at 683; Kadish, *supra* note 250, at 273; *see also* FLETCHER, *supra* note 237, at 808 (duress "focuses excusing on the incident and the circumstances that induced violation"); Horder, *supra* note 131, at 707 ("exceptional circumstances" may induce even the "normal person" to commit crime; the "excusatory element lies in the uniqueness of the pressure to act ").

[320] As Professor Dressler explains:

> By recognizing duress as an excuse, we concede that we as humans are sufficiently fallible that in extreme circumstances we will nearly inevitably . . . succumb to our weaknesses. We will choose (it *is* a choice) to take the wrong route. When the choices are this bad we conclude that the actor was not provided a fair opportunity to behave properly. In these circumstances, unless we are hypocritical, we cannot blame the wrongdoer for his actions. Acquittal here is not a function of mercy but of justice.

Dressler, *supra* note 212, at 711–12. *See also* MODEL PENAL CODE § 2.09 cmt. 2, at 374–75 (1985) (the law is "ineffective . . . [and] hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that the judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise"); Kadish, *supra* note 250, at 273–74 (coerced actor has "no effective choice given limits of human fortitude").

defense typically focuses on how the individual perceptions and psychological capacities of battered women, in fact, differ from those of the person of "reasonable firmness."[321] The more that defense resembles a plea of diminished capacity or insanity, the less the battered offender resembles the morally responsible agent for whom the defense of duress was constructed.[322] In short, the behavioral and psychological characteristics that currently comprise the battered woman defense and that render battered offenders more susceptible to threats and less capable of resistance[323] cannot be imported into the objective standard without gutting duress of its normative function.[324]

3. *Duress as Justification or Excuse*

The normative component of duress makes that defense difficult to categorize as either a justification or an excuse. A justification centers on the external, objective circumstances that surround an otherwise criminal act and seeks to determine whether, on balance, the act has either benefited (or at least not harmed) society.[325] In contrast, an excuse generally focuses on an actor's individual characteristics and subjective mental state and seeks to determine whether she can justly be held accountable.[326] As distinguished by Professor Paul Robinson:

> Justified conduct is correct behavior which is encouraged or at least tolerated. In determining whether conduct is justified, the focus is on the *act*, not the actor. An excuse represents a legal conclusion that the conduct is wrong, undesirable, but that criminal liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him.

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321 *See supra* notes 108–15 and accompanying text.

322 *See* Boland, *supra* note 24, at 629–30 (battered offender's claim of duress closely resembles a claim of mental impairment or insanity); *see also* note 313 and accompanying text.

323 *See id.* at 625–27 (evidence of past abuse admissible in cases of duress to show how battering alters battered woman's perception of imminence and "precipitously lower[s] her ability to resist her abuser").

324 *See* Fletcher, *supra* note 152, at 1293 n.72, 1300 (acknowledging law's traditional reluctance to consider defendant's "peculiarities" and "psychiatric condition" in assessing defenses like duress); Kadish, *supra* note 250, at 277 (contending that complete individualization would circumvent the rationale of excusing under defenses like duress).

325 *See* Moore, *supra* note 312, at 1096; C.J. Rosen, *supra* note 52, at 18–22.

326 *See* Dressler, *supra* note 212, at 75–76; Fletcher, *supra* note 152, at 1304; Kadish, *supra* note 250, at 258.

> Excuses do not destroy blame, . . rather, they shift it from the actor to the excusing conditions. The focus in excuses is on the *actor*. Acts are justified; actors are excused.[327]

Scholars debate the classification of duress under this dichotomy. Some, like Professors LaFave and Scott, classify duress as a sub-species of the "lesser evils" justification of necessity.[328] A few jurisdictions likewise deem duress a justification[329] or expressly condition the defense with a requirement that the harm avoided "clearly outweigh the harm sought to be prevented."[330] Most jurisdictions, however, follow the suggestion of the Model Penal Code and classify duress as an excuse, separate from the justification of necessity, that does not depend on any weighing of competing harms.[331]

That scholars disagree as to its appropriate classification illustrates that duress fails to neatly fit within either category of defense.[332] The coerced

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[327] Robinson, *supra* note 310, at 229. Other scholars similarly demarcate justifications from excuses. *See* Dressler, *supra* note 212, at 675–76; Fletcher, *supra* note 152, at 1304; Kadish, *supra* note 250, at 258; Moore, *supra* note 312, at 1095–99.

[328] LAFAVE & SCOTT, *supra* note 70, § 5.3(a), at 433 ("The rationale of the defense of duress is that, for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil . . . in order to avoid the greater evil threatened by the other person.").

[329] *See, e.g.*, LA. REV. STAT. ANN. § 14:18 (West 1986); Feliciano v. State, 332 A.2d 148, 148 (Del. 1975).

[330] TENN. CODE ANN. § 39-11-504 (1994); *see also* N.H. REV. STAT. ANN. § 26:3 (1986) ("competing harms" statute).

[331] *See* MODEL PENAL CODE § 2.09 cmt. 2, at 373 (1985) (question in duress is whether the actor should be excused even when her "choice involves an equal or greater evil than that threatened"). Most scholars would likewise classify duress as an excuse. *See* FLETCHER, *supra* note 237, at 830 (duress not justification); ROBINSON, *supra* note 89, § 177(a), at 348–51 (classifying duress as excuse); WILLIAMS, TEXTBOOK, *supra* note 124, at 626–27 (duress does not depend on the advancement of good or the lessening of evil); Dressler, *supra* note 131, at 1349–53 (most states view duress as more than comparison or weighing of harms); Kadish, *supra* note 250, at 261–62 (duress available even when not justified by lesser evils).

[332] *See* Carr, *supra* note 131, at 179 (proposing third defense classification for duress); Dressler, *supra* note 212, at 709 (noting that duress sometimes blurs into justification of necessity); Kadish, *supra* note 250, at 261 (admitting that classification of duress is "not free of doubt"). The prison escape scenario previously discussed illustrates this lack of fit. Courts in those cases often struggle to determine whether the justification of necessity or the excuse of duress better applies. *See supra* notes 236–52 and accompanying text.

act cannot be justified because one can hardly say that the coerced actor did the right thing or, on balance, caused society no harm.[333] At the same time, however, duress differs from a typical excuse that focuses on some personal disability or peculiar incapacity of the actor. Normally, such a disability excuses by distinguishing the actor from the normal morally responsible agent.[334] A coercive threat, however, does not deprive the coerced actor of her responsible moral agency.[335] Indeed, the normative component of duress assures that the coerced actor demonstrated the degree of fortitude expected of a member of the morally responsible community. In other words, even though the legally coerced actor failed to do the *right* thing, her act is nevertheless *tolerated* because she "attained . . . society's legitimate expectations of moral strength."[336]

Thus, just as actus reus and mens rea appear to collapse in duress, so does the line between justification and excuse. Its general classification as an excuse would, on first blush, make duress more prone to legitimate individualization[337] than self-defense, which is generally regarded as a justification.[338] The peculiar normative character of duress, however,

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[333] *See* Carr, *supra* note 131, at 179 (duress not justification because there exists "no morally right thing for the person to do in the face of a serious moral dilemma). Moreover, justification of the coerced act would arguably preclude prosecution of the coercive agent or similarly prevent an innocent third party from resisting the criminal act. *See* FLETCHER, *supra* note 237, at 830 (duress not justification because otherwise victim not entitled to resist and accomplice cannot be convicted); *see also infra* notes 352–68 and accompanying text (discussing differing moral equities at issue in duress).

[334] *See* Coughlin, *supra* note 24, at 13–14.

[335] *See* Carr, *supra* note 131, at 179 (duress not properly an excuse because it fails to "override responsible moral agency"); Dressler, *supra* note 131, at 1359 (coerced actor "a morally responsible agent").

[336] Dressler, *supra* note 131, at 1334.

[337] Theoretically, justifications present an entirely "objective" question that centers on the surrounding circumstances and resulting consequences of an accused's conduct, rather than on her subjective perceptions or knowledge. An act committed under justifying circumstances is not wrongful and others can rely upon a justification as a guide to future conduct. *See* Fletcher, *supra* note 152, at 1304; Moore, *supra* note 312, at 1095–96. In contrast, an excuse presents an inherently subjective question which aims at achieving "individual justice to a particular actor." Moore, *supra* note 312, at 1096. *See also* Dressler, *supra* note 212, at 675–76 (excused actor wrongs society, but does not deserve to be punished); Fletcher, *supra* note 152, at 1304 (excuses ascertain "whether particular individual can be held responsible"). Thus, "by focusing on the actor, excuses necessarily concern themselves with the subjective mental state of a particular actor." Moore, *supra* note 312, at 1096.

[338] Even the traditional classification of self-defense as a justification is not secure in the context of battered women. Many scholars would excuse, but not justify, a

counteracts this facile conclusion. Indeed, this difficulty in classifying duress illustrates its uniqueness as a criminal defense.

4. *Duress as "Exceptional" Defense*

Courts and commentators frequently describe traditional duress as a rare and exceptional defense, the limits of which are both narrowly drawn and extraordinarily demanding.[339] The stringent limitations imposed on duress flow, in part, from the fact that it excuses persons who have rationally and intentionally chosen to commit an unlawful act—persons who would ordinarily be held blameworthy.[340]

Those traditional restrictions also exist due to the difficulty of distinguishing the coerced actor from the "common run of humankind."[341] Coercion, the subjective mental state necessary to duress, cannot be empirically verified by any objectively verifiable disability like a mental disease or defect.[342] Indeed, every member of society undoubtedly and daily experiences some form of coercion wrought by life's internal and

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battered woman's killing of an abuser in non-confrontational situations that lack imminent harm. *See, e.g.*, Moore, *supra* note 312, at 1149 n.19 (contending that cases of reasonable mistake should be treated as excuses, not justifications); Schopp, *supra* note 50, at 109–110 (finding subjective inquiries regarding battered women as "relevant to culpability and excuse rather than to standards for justification").

[339] *See* United States v. Hearst, 563 F.2d 1331, 1336 n.2 (9th Cir. 1977), *cert. denied*, 435 U.S. 1080 (1978) (duress "even rarer" defense than insanity); United States v. Gaviria, 804 F. Supp. 476, 478 (E.D.N.Y. 1992) (only "extraordinary" case will satisfy "demanding" test of the "narrowly defined" defense of duress); United States v. Gregory, No. 88CR295, 1988 U.S. Dist. LEXIS 10060, at *4 (N.D. Ill. Sept. 2, 1988) (courts "narrowly circumscribe" "exceptional" defense with "stringent" limitations); State v. Toscano, 378 A.2d 755, 766 (N.J. 1977) (duress a "peculiar" defense); State v. Riker, 869 P.2d 43, 50–51 (Wash. 1994) (en banc) ("stringent requirements" for duress accord with law's "traditional skepticism" regarding the "limited" defense); *see also* MODEL PENAL CODE § 2.09 3, at 379 (1985) (noting the "exceptional nature" of duress); Bayless, *supra* note 131, at 1216 (courts "restrictively interpret" duress); Coughlin, *supra* note 24, at 2, 30, 57 (discussing "demanding" standard of duress); Dressler, *supra* note 131, at 1384 (duress "very limited and slightly disquieting" defense).

[340] *See* Dressler, *supra* note 131, at 1359–60 (only duress excuses one who rationally and intentionally places his own interest above that of the community); Horder, *supra* note 131, at 708 (duress is exception to rule that motives are normally irrelevant in determining culpability).

[341] Kadish, *supra* note 250, at 262.

[342] In this regard, duress thus differs from the excuse of insanity. *See supra* notes 310–24 and accompanying text.

external pressures.[343] In order to distinguish the coerced actor worthy of excuse from the timid or easily coerced actor for whom choice is subjectively difficult, duress requires that an actor be able to point to an imminent, sufficiently grave and objectively determinable cause of her coercion—the external threat.[344]

The decision as to where to draw the line among this omnipresent system of pressures is ultimately one of public policy.[345] Classic duress thus provides reasonably clear and identifiable restrictions on the defense designed to ensure that its excuse does not cut too broadly and exculpate persons whose choices, albeit difficult, were nonetheless fair. Traditional duress requires that the external cause of an actor's coercion be extreme and sufficiently grave in order to limit the defense to the most serious types of pressures to commit crime.[346] The requirements of immediacy and inescapability further limit the excuse to situations in which the government has no time or opportunity to intervene and the defendant is in the best and only position to prevent the threatened harm.[347]

Finally, the normative component of duress excuses only those actors who demonstrate the level of fortitude that society can fairly expect of its morally responsible members. The very rationale of duress thus requires that an accused be judged against some objective standard, regardless of her own capacities or constitutional weaknesses.[348] That is, whatever the

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[343] As noted by Sir James Stephen, the criminal law itself is a system of compulsions designed to coerce persons into compliance with the law. STEPHEN, *supra* note 272, at 466–68 (1883).

[344] *See* ROBINSON, *supra* note 89, § 177(c), at 352–55; WILLIAMS, GENERAL, *supra* note 124, at 758; Bayless, *supra* note 131, at 1210, 1196 n.22.

[345] *See* WILLIAMS, TEXTBOOK, *supra* note 124, at 625–26. (what counts as duress is "question of policy" that rests "upon an assessment of what the criminal law is capable of effecting and what it is right that it should try to do").

[346] *See* Bayless, *supra* note 131, at 1216 (duress limited to extreme circumstances); Dressler, *supra* note 312, at 354–55 (sufficiently grave threat more quantifiable and tangible for jury making moral judgment); Schulhofer, *supra* note 53, at 112–13 (duress requires extreme and overbearing compulsion).

[347] *See* Dressler, *supra* note 312, at 354–55 (stating that the "requirement of 'imminency' ensures that the danger is real"); Horder, *supra* note 131, at 709–11 (coerced defendant uniquely placed to usurp state's exclusive right to prevent harm).

[348] Even the Model Penal Code, which advocates a completely subjective standard for self-defense, as well as a substantial relaxation of the traditional elements of duress, acknowledges the importance of retaining an objective standard for duress—a standard that should not vary according to the individual's capacity to meet this legal norm. *See* MODEL PENAL CODE § 2.09 cmt. 2, at 374 (1985) (duress does not depend "upon the fortitude of any given actor").

merits of completely individualizing other excuses, the defense of duress depends on maintaining some objective standard external to the character and capacities of the individual actor.[349]

This stringent, objective standard of duress, then, clearly does not favor any further expansion of the traditional limitations on duress.[350] Nor does it support the extension of the inherently "subjective" battered woman defense, beyond self-defense, to cases of duress. As recently stated by the Fifth Circuit Court of Appeals:

> To consider battered woman's syndrome evidence in applying that [objective] test would be to turn the objective inquiry that duress has always required into a subjective one. The question would no longer be whether a person of ordinary firmness could have resisted. Instead, the question would change to whether this individual woman, in light of the psychological condition from which she suffers, could have resisted. In addition to being contrary to settled duress law, we conclude that such a change would be unwise.[351]

C. *Differing Equities: Batterer v. Innocent Third Party*

One of the primary distinctions between a battered woman's claim of self-defense and that of duress concerns the nature of her response to the perceived deadly threat. In self-defense, the woman avoids the imminent danger by responding in kind against its source—her batterer. In duress, however, the woman avoids her abuser's threat by misconduct directed against an innocent third party.[352]

This difference in the two defenses clearly makes some courts reluctant to stretch or subjectify the traditional elements of duress to encompass battered

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[349] *Compare* Fletcher, *supra* note 152 (advocating system of excuses based on the individual character and culpability of an accused by asking what she could fairly be expected to do under the circumstances) *with* Kadish, *supra* note 250, at 274–77 (defending the maintenance of an objective reasonableness standard).

[350] In holding expert testimony concerning the battered woman syndrome irrelevant to a battered offender's claim of duress, the Washington Supreme Court expressed similar sentiments: "The more stringent requirements for the duress defense are a result of the more socially harmful outcome allowed by this defense, and reflect society's conclusion that, as a matter of public policy, the defense should be limited . . . ." State v. Riker, 869 P.2d 43, 51 (Wash. 1994) (en banc).

[351] United States v. Willis, 38 F.3d 170, 176–77 (5th Cir. 1994).

[352] *See* LAFAVE & SCOTT, *supra* note 70, § 5.3(a), at 43 n.6; Bayless, *supra* note 131, at 1191 n.1.

offenders.[353] Other commentators, however, argue that the retributive desire to punish a wrongdoer for the crime committed against an innocent can be satisfied by prosecution of the author of the coercion—the batterer.[354]

That a battered offender saves herself from her batterer's deadly threat by committing a crime against another, rather than by killing her abuser, should not alone preclude a duress defense. Indeed, duress is formulated to excuse "wrongs" committed against a neutral innocent. At the same time, however, a case of duress does inject different moral claims into the excusing calculus than those involved in the "justified" killing of a threatening abuser.

The criminal law acquits the battered woman who kills her abuser in the heat of an ongoing confrontation because she possessed the right to protect herself against her abuser's unlawful and deadly aggression. A moral forfeiture theory would go further and justify her conduct by virtue of the fact that the batterer deserved killing. He had, at least temporarily, forfeited his right to life.[355] Indeed, much of the debate over extending self-defense to battered women who kill in non-confrontational circumstances may well flow from

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[353] *See, e.g.*, Neelley v. State, 642 So. 2d 494, 508–1000 (Ala. Crim. App. 1993), *writ quashed as improvidently granted*, 642 So. 2d 510 (Ala 1994), *cert. denied* 115 S. Ct. 1316 (1995) ("major distinguishing fact" between case of duress and that of self-defense is that defendant did not "choose to kill her batterer. She chose, instead, to kill an innocent third party, a choice which falls outside any acceptable notion of self-protection."); State v. Dunn, 758 P.2d 718, 725 (Kan. 1988), *habeas corpus granted sub nom.* Dunn v. Roberts, 758 F. Supp. 1442 (D. Kan. 1991), *aff'd*, 963 F.2d 308 (10th Cir. 1992) (unlike use of the battered woman syndrome in connection with self-defense, defendant attempted to use battered woman syndrome to justify crimes committed against innocent third parties); *Riker*, 869 P.2d at 51 ("Whereas someone who acts in self-defense acts against the very person pressuring him or her, an actor who successfully raises a duress defense is freed from criminal liability for harm caused to an innocent third party.").

[354] *See* Boland, *supra* note 24, at 633 (asserting that a "large measure of fault should lay against the batterer"). *See generally* Richard Delgado, *Ascription of Criminal States of Mind: Toward A Defense Theory for the Coercively Persuaded Brainwashed Defendant*, 63 MINN. L. REV. 1, 13, 30 (1978) (in advocating brainwashing defense, author finds "retributive instinct" fulfilled by punishment of the captor, "to whom the criminal action may more appropriately be ascribed"); Rosenthal, *supra* note 131, at 209 (punishment should be directed against coercer, "not against the morally innocent").

[355] For a discussion of the moral forfeiture principle and its applicability to the battered woman defense, see DRESSLER, *supra* note 68, at 181–182, 205. *See also* Morse, *supra* note 103, at 610 ("Many people may inchoately believe that perpetrators of such deeds deserve to die . . . and thus attempt to discover means to justify killing them.").

judicial fear of fostering such a "blame the victim" mentality.[356] Regardless of the legitimacy of such a rationale, its very existence illustrates that the moral equities appear balanced in favor of the battered woman in the self-defense scenario.[357]

A situation of duress adds the claims of an innocent third party to the moral equation. In such cases, the utilitarian goals of deterrence and social protection may override the retributive aim of individual justice to the battered offender.[358] Thus, a court may legitimately conclude that the extraordinary nature of duress as a defense—involving the intentional and knowing infliction of unlawful harm on a non-threatening party—justifies stringent adherence to its traditional limitations, which themselves are the product of public policy.[359] Instrumentalist goals might support even a slightly successful increase in

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[356] *See* DRESSLER, *supra* note 68, at 205 (finding moral forfeiture principle "troubling" in that it suggests that an abuser's constant "immoral and dangerous conduct renders his life nearly permanently forfeited"); Morse, supra note 103, at 610 (stating that the criminal law "rejects the legitimacy of inflamed vengeance"); Schulhofer, *supra* note 53, at 117 (noting "court's traditional preoccupation with confining the boundaries of any defense suggestive of the inevitably powerful 'blame the victim' strategy").

[357] Professor David McCord explains the battered woman's right to kill her aggressor/batterer as a vindication of the "innocents preferred" principle—one of the core moral principles that "define the essence of self-defense law." McCord & Lyons, *supra* note 73, at 130–31. According to Professor McCord, this "innocents preferred" principle accommodates the "killing is bad" principle and the "self-preservation" imperative—other core principles that often conflict in the self-defense scenario. *Id.*

[358] *See* Kadish, *supra* note 250, at 271 ("Another reason why justice for the individual is not an absolute is that it can conflict with the moral claims of other individuals."); Schulhofer, *supra* note 53, at 114 & n.30 (asserting that "though inconsistent with just deserts theory of punishment," the demanding nature of criminal law is "justified by social protection function").

It is not uncommon for the criminal law to discriminate between cases involving injury to an accomplice in an unlawful scheme and those involving injury to an innocent third party. *See, e.g.*, N.J. STAT. ANN. § 2C-11-3 (West Supp. 1994) (imposing felony murder liability when "the actor acting either alone or with one or more other persons is engaged in the commission of [an enumerated felony] . . . and in the course of such crime . . . any person causes the death of a *person other than one of the participants* . . . . ") (emphasis added); State v. Petersen, 526 P.2d 1008, 1009 (Or. 1974) (drag racing case holding that Oregon's involuntary manslaughter statute "should not be interpreted to extend to those cases in which the victim is a knowing and voluntary participant in the course of reckless conduct").

[359] *See supra* notes 339–51 and accompanying text. *But see* Fletcher, *supra* note 152, at 1308–09 (arguing that compassion, rather than public policy, should motivate excuses).

deterrence value to protect those innocents caught between the batterer and the battered. These third-party claims might also implicate the non-utilitarian focus on the blameworthiness or "moral fault" of the battered offender.[360] In short, the "innocents preferred" principle, in the context of duress, might yield a different result than that produced in the context of self-defense.[361]

Utilitarian and retributive benefits undoubtedly do flow from punishment of the person who coerces another into unlawful conduct.[362] The excuse of duress may, in some cases, merely vent blame backward onto the batterer who, with the requisite intent, coerces a battered offender into criminal conduct.[363] In cases involving an undirected threat, however, in which a battered offender commits her offense out of some "generalized" fear rather than any specific command from her abuser, prosecution of the batterer may not be available. Excusing the battered offender in those circumstances may leave the "basic [retributive] interests of the law" unsatisfied.[364]

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[360] *See* Kadish, *supra* note 250, at 264 ("To blame a person is to express a moral criticism . . . . Excuses . . . represent no sentimental compromise with the demands of a moral code; they are, on the contrary, of the essence of a moral code.").

[361] *See* McCord & Lyons, *supra* note 73, at 130–31; *see also supra* note 357 and accompanying text.

[362] The requirement that a coercive threat emanate from a human, rather than natural threat, seeks to ensure that someone is prosecuted for an unjustified wrong. *See* MODEL PENAL CODE § 2.09 cmt. 3, at 379 (1985) (if natural threats permitted and actor excused "no one is subject to the law's application"). The criminal law thus provides a number of avenues for prosecuting "the agent of unlawful force." *See id.*, § 2.09 cmt. 1, at 370 n.22. For example, one who attempts to induce another to commit a criminal offense can generally be independently prosecuted under a criminal coercion statute. *See, e.g.*, MODEL PENAL CODE § 212.5 (1985); *see also* PERKINS & BOYCE, *supra* note 121, at 1069 (discussing similar impelled perpetration statutes). If duress excuses the actual perpetrator of the offense, the coercer may still be convicted as a principal who committed the crime through an innocent instrumentality. *See* MODEL PENAL CODE § 2.06(2)(a) (1985). Finally, the author of the coercion can be convicted as an accomplice to the primary party of the crime if he possesses the requisite mens rea. *See* MODEL PENAL CODE § 2.06(2)(c), (3) (1985).

[363] *See* Dressler, *supra* note 212, at 711 ("Duress excuses by shifting blame backwards."); *cf.* Robinson, *supra* note 310, at 226 (excuses shift blame from actor to external or internal disability)

[364] *See* MODEL PENAL CODE § 2.09 cmt. 3, at 379 (1985) ("basic interests of the law may be satisfied by prosecution of the agent of unlawful force"). This raises yet another difference between self-defense and duress in the context of battered women. In self-defense, the wrongdoer who provoked the incident is punished (*i.e.*, killed), thus fulfilling society's interests in retribution and deterrence. In contrast, if no one can be held responsible for a battered offender's crime (*i.e.*, the batterer cannot be

That the batterer may escape punishment does not, of course, necessitate punishment of the battered. Harms often befall innocents for which no one can be held criminally responsible. By the same token, however, that a "large measure of fault should lay against the batterer"[365] should not, by itself, exonerate the battered offender who actually and intentionally perpetrates the criminal act. Instead, the blameworthiness of the battered offender must be independently assessed. As Professor Dressler points out, the existence of a legal excuse does not hinge on "whether someone else can be deservedly punished for the crime."[366] Instead, the central issue in any excuse, including duress, concerns "whether this particular defendant deserves punishment."[367] When a battered offender commits a crime in the absence of any imminent threat, "there may be enough guilt to go around."[368]

VII. DOWNWARD ADJUSTMENT AND THE SLIPPERY SLOPE

In order to excuse battered women under the aegis of duress, a court or legislature must be willing to either eliminate many of its traditional elements (as proposed in the Model Penal Code), or implicitly modify them by incorporating the individual capacities, characteristics, and propensities of battered women into its objective and normative standard. A court, in other words, must be willing to "adjust downward" the demanding standard of duress before accommodating battered offenders in non-traditional cases of duress.[369] While such an adjustment might very well be desirable, it cannot be made without similar modification of the theory of personal accountability and free choice that currently underlies our criminal justice system and its parsimonious theory of excuses. Nor can such an adjustment, if made, be legitimately confined to the defense of battered women.

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prosecuted for his undirected threat), these societal interests go unfulfilled.

[365] Boland, *supra* note 24, at 633.

[366] Dressler, *supra* note 131, at 1376; *see also* Dressler, *supra* note 312, at 344 ("criminal law has no aversion to convicting more than one person for a single crime").

[367] Dressler, *supra* note 131, at 1376.

[368] Dressler, *supra* note 212, at 712 (cautioning against shifting all blame to coercer in cases lacking an imminent threat).

[369] *See* Coughlin, *supra* note 24, at 57 ("The demanding 'duress' standard, which the criminal law insists that responsible actors must satisfy, is adjusted downward to accommodate women's pre-dispositions for obedience to men."). *But see* Appel, *supra* note 24, at 979 (contending that battered woman syndrome does not change or extend the "current law of duress").

A. *Adjusting Duress Downward*

The battered woman defense, like other proposed extensions of duress,[370] seeks to explain a battered woman's behavior, to aid in understanding how a battered offender came to do what she is accused of doing. Its acceptance and success lie in broad contextualization and an individualized assessment of the personal capacities and good character of the battered actor. It speaks, as some have said, in a feminine voice based on empathy, caring, and compassion.[371]

As many commentators have noted, however, our current system of blaming—of personal responsibility and just deserts—does not speak in a feminine voice of empathy or supportive compassion. Instead, the criminal law is "judgmental" and "demanding."[372] It aims, not at understanding criminal conduct, but at defining it in terms of general, minimal, (and, it is hoped, reasonable) norms.[373] These standards, forged by public policy as well as by individual justice,[374] guide lawful conduct and, given this normative function, rarely vary according to the individual capacities or good character of the actor.[375]

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[370] Examples of two such defenses include brainwashing, *see* Peter Alldridge, *Brainwashing as a Criminal Defense*, 1984 CRIM. L. REV. 726; Delgado, *supra* note 354, and defenses based on disadvantaged background, *see* David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQUALITY 9 (1985).

[371] *See* Schulhofer, *supra* note 53, at 124 (finding that "different voice" feminism "collides with the core assumptions of criminal law"); Dressler, *supra* note 212, at 681–82 n.67 ([T]hose who broadly contextualize—people who speak with a feminine moral voice—tend to excuse more people.); *see also* Schneider, *Equal Rights*, *supra* note 52, at 639–40 (advocating individualization of excusing conditions for battered women).

[372] Schulhofer, *supra* note 53, at 124.

[373] As Professor Schulhofer points out: "Criminal law . . . is judgmental and demanding. Its usual posture is *not* supportive and empathetic. Its aim is not to understand each person in her individuality, but rather to articulate general norms, and to judge and to condemn even when compliance was understandably difficult." *Id.* *See also* Kadish, *supra* note 250, at 270 (asserting that "criminal law . . . must serve as a clear, explicit guide to lawful conduct").

[374] *See* Schulhofer, *supra* note 53, at 124; *cf.* Fletcher, *supra* note 152, at 1309 ("[Yet so long as we think of law as a pursuit of policies, we are inclined to think the probable consequences of our decision ought to mediate our sense of justice to the individual accused.").

[375] *See* Fletcher, *supra* note 152, at 1300 (individualizing excuses runs contrary

The current theory of personal responsibility thus assumes that all humans are morally responsible agents who possess free will and, accordingly, are personally accountable for their intentional conduct—even conduct that is somehow "caused."[376] Exceptions to this principle, like the excuse of duress, are sparingly granted and severely restricted.[377]

Likewise, personal responsibility, under the present regime, rejects any notion of excuse based solely upon compassion or character.[378] Motives are generally irrelevant to culpability, for we can assess blame even if we can understand and empathize with an actor.[379] As Professor Schulhofer has pointed out, the criminal law "can understand, empathize and care without concluding that we must excuse."[380] Indeed, sometimes the more we can empathize, the more we blame in order to prevent us from acting likewise. Again, duress represents a very limited exception to this usual discounting of motive; an exception which itself depends upon an external standard of personal responsibility.[381]

Thus, the existing paradigm of personal guilt rejects the type of individualization of excusing conditions that the extension of the battered woman defense to duress would require. Classic duress, likewise, will not easily accommodate the internal susceptibilities and psychological incapacities, *i.e.*, the unique lack of fortitude, that are now part and parcel of the battered woman syndrome.[382] While the expansion of duress to

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to common law tradition based on "rules that suppress the differences among persons and situations"); Kadish, *supra* note 250, at 278 (only with insanity does law permit individualized inquiries into the capacities of the defendant).

[376] The current blaming system rejects any causal theory of excuses that would exonerate all criminal conduct that can be traced to internal or external causes for which the accused is not responsible. *See* Dressler, *supra* note 212, at 686–87 (causal theory would result "in a universal excuse"); Moore, *supra* note 312, at 1092 (causal theory leads to "absurd conclusion that no one is responsible for anything").

[377] Dressler, *supra* note 312, at 357–58 (society limits excuses to most severe situations).

[378] *See* Dressler, *supra* note 131, at 1360–63 (compassion alone will not excuse, nor will good character free actor of responsibility for wrongdoing); Dressler, *supra* note 212, at 674, 683 (while compassion is good, it does not, alone, excuse many wrongdoers who merit both compassion and blame); Kadish, *supra* note 250, at 289 ("compassion and mitigation are not incompatible with blame").

[379] *See* Moore, *supra* note 312, at 1147 ("To stand back and to refuse to judge because one understands the causes of criminal behavior is to elevate one's self over the unhappy deviant.").

[380] Schulhofer, *supra* note 53, at 126.

[381] *See* Kadish, *supra* note 250, at 289 ("We need some standard of responsibility external to the make-up of the person to maintain our practices of blame.").

[382] As Professor Coughlin has recognized: "The [battered woman] defense itself

encompass battered offenders may well represent a more just system of blaming,[383] that modification cannot be wrought without generalizing duress by adjusting downward its stringent requirements.

Moreover, a more generalized coercion defense will likely draw the "slippery slope" objection that its expanded ambit cannot be restricted to the defense of battered women. Instead, once its demanding requirements are relaxed, duress must similarly excuse a broader class of offenders who are arguably subject to equally coercive pressures.

B. *The "Slippery Slope"*

A variety of pressures, both human and natural, hereditary and environmental, arguably "compel" persons into crime. As shown previously, the traditionally restrictive parameters of duress exist, at least in part, to distinguish the legally coerced actor from the general population of other criminal offenders subject to similarly coercive pressures.[384] To prevent its excuse from cutting too broadly and exonerating persons whose choices, while personally difficult, were nonetheless fair, classic duress severely restricts the types of pressures that qualify for its excuse.[385] Thus, as traditionally formulated, duress will not excuse victims of non-human coercive circumstances like broken homes or disadvantaged backgrounds.[386] Nor will it excuse victims of alleged brainwashing who

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defines the woman as a collection of mental symptoms, motivation deficits, and behavioral abnormalities; indeed, the fundamental premise of the defense is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates." Coughlin, *supra* note 24, at 7.

[383] Indeed, some would argue that women, not only battered women, cannot be viewed as morally responsible agents until the existing paradigm of responsibility embraces their voice through individualization and contextualization, caring and compassion, empathy and understanding. *See* Coughlin, *supra* note 24, at 92 (stating that the task is to revise current theory of responsibility to accommodate women); Schneider, *supra* note 32, at 566–67 (challenging the "concept of reasonableness" to encompass "the wealth of different experiences of both men and women").

[384] *See supra* notes 339–51 and accompanying text (discussing exceptional nature of duress).

[385] *See* Bayless, *supra* note 131, at 1210 (traditional limitations on duress provide objective criteria to distinguish "between a person unable to choose rationally and a person who must make a great effort to do so").

[386] According to Professor Dressler, such "situational duress" would excuse an actor "for committing a crime if, through no fault of her own, she is placed in a situation so harsh that a person of ordinary moral firmness in her situation would have committed the crime." DRESSLER, *supra* note 68, at 270. Only a few commentators

commit crimes under the threatening shadow of prolonged physical and psychological abuse, rather than under any impending threat of immediate harm.[387]

As previously discussed, the defense of many battered offenders, whose plight is frequently analogized to that of brainwashed victims, depends on an explicit or implicit expansion of duress to encompass the long-term and psychologically wasting abuse that renders them submissive to their abusers. The inclusion of such long-term psychological pressures within the ambit of duress, however, blurs the relatively clear perimeters drawn by classic duress.[388] Moreover, such inclusion further increases the difficulty of distinguishing those deprived of a fair opportunity for lawful

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advocate this "duress of circumstances." *See, e.g.*, Bazelon, *supra* note 370; Delgado, *supra* note 370. The criminal law academy generally derides these new excuses as emasculating the notions of free will and choice that support the current theory of criminal responsibility. *See* FLETCHER, *supra* note 237, at 801–02 (recognizing that excuse based on prolonged social deprivation "leads us into the cul-de-sac of environmental determinism" and the abandonment of "the entire institution of blame and punishment"); Dressler, *supra* note 131, at 380–84 (assessing and rejecting theory of duress based upon social and economic deprivation); Kadish, *supra* note 250, at 283–85 (contending that excuses based on social deprivation fail to establish the breakdown of rationality and judgment that is incompatible with moral agency); Moore, *supra* note 312, at 1146 ("[O]ne is responsible for actions that result from one's choices, even though those choices are caused by factors themselves unchosen."); Stephen Morse, *The Twilight of Welfare Criminology: Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1268 (1976) (criticizing Bazelon's proposal because it denies that actors from disadvantaged backgrounds are "autonomous and capable of that most human capacity, the power to choose").

[387] MODEL PENAL CODE § 2.09 cmt. 3, at 376–77 (1985). In contrast, while the Model Penal Code rejects duress of circumstances, it substantially expands duress to potentially excuse victims of brainwashing. *See supra* notes 220–28 and accompanying text (examining ramifications of Code's deletion of "imminence" as a threshold requirement of duress).

[388] For a discussion of the line-blurring problems that arguably inhere in the creation of a separate "brainwashing" defense, see Alldridge, *supra* note 370, at 731–32, 737 (rejecting view of brainwashing as extension of duress and advocating entirely new excuse); Delgado, *supra* note 354, at 7 n.29 (arguing that "[e]xtension of existing doctrine to include the 'hard case' of a coercively persuaded defendant may blur the lines separating legal concepts to the point where no one can predict their boundaries"); Dressler, *supra* note 312, at 358–60 (finding brainwashing defense to lack bright line clarity of classic duress, while excluding other potentially equal and morally similar claims based on reduced choice); Lunde & Wilson, *supra* note 174, at 342 (arguing that the brainwashing defense increases the difficulty of determining when coerced behavior ends and truly voluntary behavior begins).

conduct from those whose personal vulnerability merely makes compliance more onerous.[389]

This potential bleeding of duress makes courts reluctant to expand its borders in defense of battered offenders. The recent opinion of the Washington Supreme Court in *State v. Riker*[390] illustrates this hesitancy. In *Riker*, a battered woman claimed that a police informant coerced her delivery and possession of cocaine. Although the defendant had no intimate or long-term relationship with her alleged coercer, she claimed that her status as a battered woman distorted her perception of danger and rendered her more submissive to the informant's threats. In affirming the trial court's exclusion of expert testimony concerning the battered woman syndrome, the Washington Court stated:

> Without requiring a foundation which would distinguish Debbie Riker's fear from that of every other citizen who has a troubled past there is a danger that the evidentiary doors will be thrown open to every conceivable emotional trauma. Ultimately, the jury's finding of duress would rest upon sympathy for the defendant, rather than an evaluation of her present danger. These considerations are more appropriately a part of sentencing.[391]

Battered offenders thus need to sufficiently distinguish their situation from other submissive offenders, subject to equally coercive long-term pressures, who likewise commit their crimes under the power and control of another.[392] The severe, long-term physical and psychological abuse experienced in battering relationships, as well as the behavioral and psychological symptoms engendered by that abuse, may provide the

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[389] As Professor Paul Robinson explains:

> When . . . an individual is excused because of the fact of long-term conditions, rather than a single threat of force, his situation is not as readily distinguishable from that of many others who face ongoing personal problems and economic pressures. An excuse based on such less dramatic and more long-term pressures would tend to undermine a norm of obedience to the law and could create the impression of legal norms that improperly vary depending upon the individual's personal capacities.

ROBINSON, *supra* note 89, § 177(e)(7), at 365-66

[390] 869 P.2d 43 (Wash. 1994) (en banc).

[391] *Id.* at 51 n.5.

[392] *See* ROBINSON, *supra* note 89, § 177(e)(7), at 365 ("There should be strong reasons compelling disparate treatment of actors who are equally unable to control their conduct.").

necessary basis for discrimination.[393] Indeed, that battered women suffer from an established psychological "syndrome" may well separate battered offenders from other submissive defendants who cannot (yet) take advantage of such a psycho-social label.[394] Again, however, while this psychological abnormality may aid battered offenders in staving off slippery slope objections, it directly contravenes the normative aspect of duress, which refuses to recognize individual incapacities not shared by "men in general."[395]

Moreover, as feminist scholars like Elizabeth Schneider now acknowledge, power and control mark many relationships, particularly intimate ones.[396] According to Professor Schneider, while many women have relationships with controlling men,[397] the use of violence to control partners in relationships is not unique to heterosexual relationships or to those involving sexual intimacy.[398] Indeed, lesbian and gay battering, and elder and child abuse, all necessitate a broader view of battering that transcends "woman battering."[399] Schneider notes the "paradox" this

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[393] In *Johnson*, the Ninth Circuit acknowledged that while the Model Penal Code expansion of duress to include brainwashing "may go too far if not linked to gross and identifiable classes of circumstances," battered women, for purposes of sentencing, were "in circumstances forming such a class." United States v. Johnson, 956 F.2d 894, 900 (9th Cir. 1992).

[394] Battered women do not generally suffer from any objectively verifiable "mental disease or defect." *See supra* note 113. For a discussion of syndrome evidence in criminal cases, see generally Charles Bleil, *Evidence of Syndromes: No Need for a "Better Mousetrap,"* 32 S. TEX. L. REV. 37 (1990); David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Non-Traditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19 (1987).

[395] MODEL PENAL CODE § 2.09 cmt. 2, at 374 (1985). *See supra* notes 310–24 and accompanying text.

[396] Indeed, Professor Schneider finds power and control a characteristic of virtually all relationships. *See* Schneider, *supra* note 32, at 538; *see also* Dutton, *supra* note 33, at 1211 (finding "gender analysis of power" insufficient "to understand the dynamics of violence and abuse in all intimate relationships").

[397] Schneider, *supra* note 32, at 531.

[398] *Id.* at 538.

[399] This expanded vision of battering has already prompted calls to expand self-defense, via psychological theories similar to the battered woman syndrome, to a much larger category of cases involving "power and control in intimate relationships generally." Schneider, *supra* note 32, at 538–44. Dr. Walker views the psychological theory underlying the battered woman syndrome as helpful in "understand[ing] victims' states of mind in a variety of situations." Walker, *Self-Defense*, *supra* note 46, at 334. At least one court has acknowledged that "victims of physical, sexual, and psychological abuse may be men." Commonwealth v. Stonehouse, 555 A.2d 772 (Pa.

re-definition creates for battered women seeking "special legal recognition":

> [A]lthough this revised definition of battering more fully describes the range of experiences of women who are beaten, it complicates the argument that women who have been physically battered are a distinct group with unique problems. In other words, by collapsing the distinction between physical abuse and other forms of abuse within intimate relationships, battered women become like everyone else. Since all relationships involve issues of power and control, practical difficulties thus arise in differentiating battered women's experiences from women's experiences within heterosexual relationships, or, as we have expanded our understanding, within relationships generally.[400]

This blurring of lines between woman-battering and other forms of battering—between battering and other manifestations of power and control—may make a court, fearful of plummeting down the proverbial slippery slope, hesitant to modify duress in the case of battered offenders.[401] Indeed, as society's vision of battering expands, so must the

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1989). Gay men and lesbians accused of murdering abusive partners often draw on battered women's self-defense theories. *See generally* Denise Bricker, *Fatal Defense: An Analysis of Battered Woman Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379 (1993); David S. Dupps, *Battered Lesbians: Are They Entitled to a Battered Woman Defense?*, 29 J. FAM. L. 879 (1990/1991); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE UNIV. L. REV. 567 (1990). Finally, although it has failed to generate either the support or success achieved by the battered woman syndrome, the psychologically similar "battered child syndrome" supports the claim of self-defense in an increasing number of parricide cases. *See, e.g.*, People v. Gindorf, 512 N.E.2d 770 (Ill. App. Ct.), *appeal denied*, 517 N.E.2d 1090 (Ill. 1987), *cert. denied*, 486 U.S. 1011 (1988); State v. Janes, 850 P.2d 495, 506 (Wash. 1993) (en banc). *See generally* Lauren E. Goldman, Note, *Nonconfrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuse*, 45 CASE W. RES. L. REV. 185 (1994); John Nelson Scobey, *Self-Defense Parricide: Expert Psychiatric Testimony on the Battered Child Syndrome*, HAMLINE J. PUB. L. & POL'Y 181 (1992); Susan C. Smith, *Abused Children Who Kill Abusive Parents: Moving Toward an Appropriate Legal Response*, 42 CATH. U. L. REV. 141 (1992).

[400] Schneider, *supra* note 32, at 538–39. Schneider believes that this paradox can be resolved only by further individualizing excuses for both men and women. *Id.* at 566–67. *See also* Schneider, *Equal Rights*, *supra* note 52, at 639–40 ("The law can equalize the positions of male and female defendants by recognizing their differences.").

[401] *See* Dressler, *supra* note 312, at 357–58 (society does not consider degrees of

range of potential defendants eligible for a parallel expansion of duress.

In sum, the expansion of duress to excuse battered offenders places them in somewhat of a dilemma. Excusing battered offenders under the banner of duress hinges on distinguishing the coercive circumstances surrounding a battered woman's crime from those surrounding other offenders not entitled to excuse.[402] While the psychological incapacity that currently epitomizes the battered woman defense might sufficiently distinguish battered offenders, such subjective lack of fortitude contravenes the inherently objective and normative nature of duress. At the same time, the more a battered offender bases her claim of duress on the external societal pressures to which she is subject (*i.e.*, battering), the less "abnormal" her situation arguably becomes and the less entitled she is to special legal treatment via expansion of duress.

C. *Grappling with the "Slope"*

Admittedly, slippery slope objections are generally unpersuasive. If an accused does not merit blame, she should not merit conviction, regardless of any ripple effect on precedent generated by her acquittal. At the same time, however, those who advocate excusing battered offenders under the banner of duress often implicitly restrict this expanded excuse to battered women who, it is argued, face unique circumstances that justify special legal attention. The foregoing analysis simply recognizes that duress likely cannot be generalized exclusively in favor of battered women and without modification of the excuse itself.

In writing this Article, I, like the courts addressing this issue, have struggled to determine whether such an extension or modification of duress is necessary or desirable. I am still uncertain of my tentative conclusions and expect to be wrestling with this issue for some time to come.

The battered woman defense is clearly relevant to the subjective

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threats due to "belief that extension to other cases might make excuses limitless"); Horder, *supra* note 131, at 708 (duress must be narrowly construed to prevent indeterminacy and unpredictability); Kadish, *supra* note 250, at 274 (generalized coercion defense would "open nearly every prosecution to claim that even reasonable and lawful persons would have done the same").

[402] *See supra* notes 341–44 and accompanying text. To preserve its deterrent value, the criminal law conditions its excuses on the ability to distinguish the excused actor from others who are arguably in the same situation and subject to similar pressures. *See* ROBINSON, *supra* note 89, § 177(e)(7), at 365 ("'gross and verifiable' disability . . . permits exculpation of the blameless without dissipation of the deterrent effect of the criminal law prohibition"); Bayless, *supra* note 131, at 1216 (broad expansion of duress will weaken general deterrence).

component of a battered woman's coercion defense. It undeniably aids the woman in bolstering (and in many cases, in salvaging) her credibility before the fact-finder.[403] It supports the honesty of her fear, as well as her belief that committing a crime was the only way to avert harm, even in the absence of an objectively imminent and explicit threat.[404] Again, however, duress does not consist solely of these subjective factors. Every jurisdiction in this country requires the battered offender to additionally establish that her honest fear and belief were objectively reasonable.[405]

In many atypical cases of duress, the battered woman cannot establish this objective element unless a court is willing to subjectify the reasonableness standard with the special psychological vulnerability and paralysis that currently comprise the battered woman syndrome.[406] That duress is generally classified as an excuse, rather than a justification, arguably makes such individualization more theoretically sound for duress than for self-defense.[407] Ultimately, however, the unique nature of duress as a normative excuse dependent upon some standard of conduct external to an actor's individual psyche should preclude this degree of subjectification.

Of course, one could argue that normative judgments like those made in assessing duress are especially suited for resolution by the jury.[408] That is, because duress requires a judgment about what a person of reasonable firmness would do under similar circumstances, the question of coercion, in all but extreme cases, arguably should go to the jury as representatives of the relevant standard-setting community.[409] Fear of fostering the "abuse excuse" can perhaps be allayed by saddling the defendant with the ultimate

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[403] *See supra* notes 99–100, 192–93 and accompanying text.

[404] One commentator has suggested, however, that the current formulation of the battered woman defense might actually undermine a battered woman's credibility. While acknowledging that expert testimony concerning a well-supported syndrome might be "relevant to the defendant's credibility under certain limited conditions," Professor Schopp believes that such testimony "may actively undermine her credibilty with the jury by portraying her relevant beliefs as the product of a pathological syndrome rather than as reasonable inferences from her experience." Schopp, *supra* note 50, at 90–91.

[405] *See infra* APPENDIX.

[406] *See supra* notes 192–209 and accompanying text.

[407] *See supra* notes 193–209, 229–22 and accompanying text.

[408] *See* Dressler, *supra* note 131, at 1374 (characterizing duress as presenting "morality play . . . especially suitable for resolution by the jury").

[409] *See* ROBINSON, *supra* note 89, § 177(e)(7), at 365–66 ("One might argue that regardless of the cause of the coercion, the defendant should have the opportunity to persuade the jury that, for reasons not attributable to him, he could not control his conduct sufficiently to be held accountable for it.").

burden of persuasion on her coercion defense.[410] Arguably, these are "procedural" solutions that do not purport to change the substantive requirements of classic duress; they simply relax procedural hurdles that preclude the battered offender from presenting her case to the jury. That jury must still determine whether the battered offender has succeeded in proving the traditional elements of her defense.[411] Such arguments, however, beg the central question regarding the relevance of the battered woman defense to the excuse of duress.

Potentially, the battered woman defense speaks to abnormal, external circumstances that severely restrict the battered offender's opportunity to

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[410] Jurisdictions differ on whether the prosecution or defense bears the burden of persuasion concerning duress. *See* MODEL PENAL CODE § 2.09 cmt. 4, at 384 & nn. 66–67 (1985); ROBINSON, *supra* note 89, § 177(a), at 350–51 & n.5. There is no federal constitutional bar to placing on the defendant the burden of persuasion to prove the affirmative defense of duress by a preponderance of the evidence. *See* United States v. Santos, 932 F.2d 244, 248–49 (3d Cir. 1991). At least one court receptive to the battered woman defense in the context of duress has explicitly placed the burden of persuasion on the battered woman. In McMaugh v. State, 612 A.2d 725 (R.I. 1992), the Rhode Island Supreme Court held:

> Today we acknowledge that this court does recognize that battered woman's syndrome is a mental or an emotional condition that can affect women and that it does have certain legal consequences. Nevertheless we intend that a defendant's assertion of the condition be exposed to the most exacting scrutiny to determine its legitimacy in each factual circumstance in which it is presented. When the issue of battered woman's syndrome is raised as a defense in a criminal trial, we hold that the state will not be required to disprove it beyond a reasonable doubt. Rather a defendant will be required to prove the existence of the condition as an affirmative defense by a fair preponderance of the evidence. The defendant must bear the burden to prove the existence of facts that would constitute the battered-woman's-syndrome defense.

Id. at 733–34 (citations omitted). *See also* State v. Toscano, 378 A.2d 755, 766 (N.J. 1977) (holding that the "admittedly open-ended nature of [the duress] standard, with the possibility for abuse and uneven treatment, justifies placing the onus on the defendant to convince the jury").

[411] Professor Holly Maguigan has proposed a similar reform in the context of self-defense. Instead of reformulating self-defense, Professor Maguigan would reform the procedural rules that govern whether a battered woman can get her defense to the jury. Maguigan, *supra* note 52, at 387. She proposes a rule that requires a self-defense instruction whenever the defendant produces any evidence from any source on any (not all) of the elements of self-defense. It would then be up to the jury to determine whether all of those elements had been satisfied. *Id.* at 441–42.

freely choose lawful over unlawful conduct. So formulated, the defense would dovetail with the conception of duress as a "lack of fair opportunity" excuse.[412] The battered woman defense, however, currently does not focus on such external circumstances. It centers instead on the internal psychological incapacities of battered women and their special subjective vulnerability to their abusers.[413] It is this very formulation of the defense, designed to subjectify (and hence establish) "imminence," "inescapability," and "reasonableness," that runs contrary to the normative, objective, and exceptional nature of duress.

Ultimately, such subjective, "incomplete" duress seems most appropriately accounted for through the use of sentencing discretion in mitigation of a battered offender's punishment.[414] Judges should possess the discretion to exercise compassion in light of an accused's individual character and susceptibilities and mete out punishment in proportion to the battered offender's reduced blameworthiness. Unfortunately, sentencing constraints like guidelines and mandatory minimum penalties currently shackle this essential judicial discretion.[415] Moreover, in the current "get tough on crime" political climate, sentencing reform appears remote and unlikely. It is tempting to compensate for this sentencing inadequacy by throwing up one's hands in frustration and urging that if the battered woman defense cannot be fully accounted for at sentencing, a court has no alternative but to permit the jury to consider it in assessing guilt.[416] While emotionally appealing, this argument remains theoretically disquieting. I question the wisdom of attempting to correct a faulty sentencing scheme with an injudicious expansion of the substantive excuse itself [417]—an

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[412] *See generally* Dressler, *supra* note 131.

[413] *See supra* notes 107–14, 201–09 and accompanying text.

[414] *See* Dressler, *supra* note 212, at 700–01 (finding broad contextualization appropriate at sentencing); Kadish, *supra* note 250, at 289 (favoring mitigation "based on special elements in background of individual"); Schulhofer, *supra* note 53, at 112 (noting that the judgmental feature of criminal law " is considerably muted" at the more individualistic sentencing stage).

[415] *But see* Nagel & Johnson, *supra* note 38, at 219–221 (contending that female drug offenders continue to benefit from special sentencing discretion under federal guidelines scheme).

[416] *See, e.g.*, Dressler, *supra* note 212, at 701 n. 136 (noting that mandatory minimums increase pressure "to load substantive penal code with full and partial excuses"); *see also* Aron, *supra* note 2, at 17 (describing "Alice-in-Wonderland journey of the battered woman through the federal criminal justice system").

[417] Others have expressed similar concerns. *See* Dressler, *supra* note 212, at 684 (rejecting use of excuses "to circumvent poorly devised system of punishment").

expansion that requires a fundamental modification in excusing[418] and that applies to a much broader class of psychologically "coerced" offenders.[419]

VIII. CONCLUSION

The differing natures of self-defense and duress, as well as the innocents preferred principle at issue in duress, preclude any facile analogy between the two defenses based upon a mere overlap in their prima facie elements. Duress, as a defense to criminal liability, is indeed both exceptional and demanding. Its normative aspect ensures that the legally coerced actor satisfies society's legitimate expectations of conduct becoming a "person of reasonable firmness." Its traditionally stringent requirements restrict its excuse to the most serious types of pressures to commit crime and to situations where the defendant is in the best and only position to avert the threatened harm.

Some battered offenders will undoubtedly be able to satisfy even the most rigorous strictures of classic duress. In cases where an abuser is present and threatening a woman with imminent and severe physical harm unless she engages in illegal activity, courts should not hesitate to submit the issue of duress to the fact-finder. Nor should courts prevent the battered offender from establishing that defense with both lay and expert testimony concerning domestic abuse.

Less traditional cases of alleged coercion, however,—where the abuser is neither present nor immediately threatening the woman, or where she engages in a series of criminal acts over an extended period of time—fall outside the parameters of classic duress. In order to excuse battered offenders in these atypical cases, the restrictive requirements of duress must be eliminated or, at the very least, substantially relaxed. "Imminence" must be debrided of its inherent temporal meaning. "Inescapability" must encompass the perceived unavailability and inaccessibility of social assistance. Most importantly, its objective backstop—the person of reasonable fortitude—must be subjectified to include the special subjective vulnerability and psychological incapacity that currently comprise the battered woman defense.

Such a downward adjustment in the demanding nature of duress cannot

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[418] The merits of overhauling the principles of personal accountability and free choice that currently underlie our criminal justice system go well beyond the scope of this Article.

[419] *See, e.g.*, United States v. Smith, 987 F.2d 888 (2d Cir.), *cert. denied*, 114 S. Ct. 209 (1993); *see also* Schulhofer, *supra* note 53, at 124 (caring and helpful conception of criminal law not confined to situation of battered woman).

be made without a similar modification of our current system of blaming. Nor can such an adjustment, if made, legitimately be confined to the defense of battered women. Absent such modifications, the coercion undoubtedly experienced by battered offenders must be accounted for in a flexible system of sentencing, where caring, compassion, and individual character should play a significant role. The sentencing scheme in many jurisdictions currently constrains the discretion essential to such a system and must be reformed to permit the "downward adjustment" in punishment commensurate with a battered offender's reduced blameworthiness.

APPENDIX
JURISDICTIONAL SURVEY: DURESS STATUTES

STATE	ALABAMA	ALASKA	ARIZONA	ARKANSAS	CALIFORNIA
CITE	§ 13A-3-30 (1994)	§ 11.81.440 (Michie 1994)	§ 13-412 (1989)	§ 5-2-208 (Michie 1993)	§ 26(6) (West 1988)
TEMPORAL PROXIMITY	imminent		immediate		present and immediate[1]
NATURE OF COERCIVE THREAT	death or serious physical injury	unlawful force	serious physical injury	unlawful force	lives endangered
OBJECT OF THREAT	himself or another	defendant or a third person	his person or person of another	his person or person of another	their lives
OBJECTIVE STANDARD		reasonable person in the defendant's situation unable to resist	reasonable person in the situation would not have resisted	reasonably believed; person of ordinary firmness in actor's situation would not have resisted	reasonable cause
NATURE OF OFFENSE—EXCLUDES	murder; any killing under aggravated circumstances		offenses involving homicide or serious physical injury		crime punishable with death
BARS RECKLESS CONDUCT	yes	yes	yes	yes	

[1] People v. Manson, 132 Cal. Rptr. 265, 329 (Cal. Ct. App. 1976), *cert. denied*, 430 U.S. 986 (1977).

STATE	COLORADO	CONNECTICUT	DELAWARE	GEORGIA	HAWAII
CITE	§ 18-1-708 (West 1995)	§ 53A-14 (West 1994)	tit. 11, § 431 (1987)	§ 16-3-26 (1992)	§ 702-231 (1985)
TEMPORAL PROXIMITY	present, impending, imminent[2]	imminent		imminent	
NATURE OF COERCIVE THREAT	unlawful force	physical force	force against person	death or great bodily harm	unlawful force against person
OBJECT OF THREAT	him or another person	him or third person	his person or person of another	his imminent death	his person or person of another
OBJECTIVE STANDARD	reasonable person in his situation unable to resist	person of reasonable firmness in his situation unable to resist	reasonable person in his situation unable to resist	reasonably believes	person of reasonable firmness in his situation unable to resist
NATURE OF OFFENSE—EXCLUDES	class 1 felony			murder	
BARS RECKLESS CONDUCT	yes	yes	yes		yes

[2] People v. Maes, 583 P.2d 942, 944 (Colo. 1978).

STATE	IDAHO	ILLINOIS	INDIANA	IOWA	KANSAS
CITE	§ 18-201(4) (Michie 1987)	ch. 720, para. 5/7-11 (Smith-Hurd 1993)	§ 35-41-3-8 (West 1994)	§ 704.10 (West 1993)	§ 21-3209 (1988)
TEMPORAL PROXIMITY		imminent	imminent	imminent	imminent
NATURE OF COERCIVE THREAT	lives endangered	death or great bodily harm	felony: serious bodily injury non-felony: force or threat of force	serious injury	death or great bodily harm
OBJECT OF THREAT	their lives	upon him	himself or another		upon him, spouse, parent, child, brother, or sister
OBJECTIVE STANDARD	reasonable cause	reasonably believes	person of reasonable firmness incapable of resisting the pressure	reasonably believes	reasonably believes
NATURE OF OFFENSE—EXCLUDES	crime punishable with death	offense punishable with death	offense against the person defined in IC 35-42	intentional/reckless acts causing physical injury to another	murder or voluntary manslaughter
BARS RECKLESS CONDUCT			yes		yes

STATE	KENTUCKY	LOUISIANA	MAINE	MINNESOTA	MISSOURI
CITE	§ 501.090 (Michie 1990)	§ 14:18(6) (West 1986)	tit. 17, § 103-A (West 1983)	§ 609.08 (West 1987)	§ 562.071 (Vernon 1979)
TEMPORAL PROXIMITY		present and immediate	imminent	instant	imminent
NATURE OF COERCIVE THREAT	unlawful physical force	death or great bodily harm	death or serious bodily injury	death	unlawful physical force
OBJECT OF THREAT	him or another		himself or another person	participator in crime	him or a third person
OBJECTIVE STANDARD	person in his situation could not reasonably be expected to resist	reasonably believes	would prevent reasonable person in defendant's situation from resisting	reasonable apprehension	person of reasonable firmness in his situation unable to resist
NATURE OF OFFENSE—EXCLUDES	intentional homicide	murder	intentional or knowing homicide	murder, but can mitigate to first degree manslaughter	murder
BARS RECKLESS CONDUCT	yes		yes		yes

STATE	MONTANA	NEVADA	NEW HAMPSHIRE	NEW JERSEY	NEW YORK
CITE	§ 45-2-212 (1993)	§ 194.010(8) (Michie 1993)	§ 626:3 II (1986)	§ 2C:2-9 (West 1982)	§ 40.00 (McKinney 1987)
TEMPORAL PROXIMITY	imminent		clear and imminent[3]		imminent
NATURE OF COERCIVE THREAT	death or serious bodily harm	death or great bodily harm	lesser evils statute	unlawful physical force	unlawful physical force
OBJECT OF THREAT	upon him	their lives	himself or another	his person or person of another	him or a third person
OBJECTIVE STANDARD	reasonably believes	reasonable cause	ordinary standards of reasonableness	person of reasonable firmness in his situation unable to resist	person of reasonable firmness in his situation unable to resist
NATURE OF OFFENSE—EXCLUDES	offense punishable with death	crime punishable with death		murder, but can mitigate to man-slaughter	
BARS RECKLESS CONDUCT			yes	yes	yes

[3] State v. Fee, 489 A.2d 606, 607 (N.H. 1985).

STATE	NORTH DAKOTA	OKLAHOMA	OREGON	PENNSYLVANIA	SOUTH DAKOTA
CITE	§ 12.1-05-10 (1985)	tit. 21, § 156 (West 1983)	§ 161.270 (1993)	tit. 18, § 309 (1983)	§ 22-5-1 (1988)
TEMPORAL PROXIMITY	felony: imminent non-felony: force		present, imminent, impending[4]		
NATURE OF COERCIVE THREAT	felony: death or serious bodily injury	actual compulsion by use of force or fear	unlawful physical force	unlawful physical force	unlawful force
OBJECT OF THREAT	himself or another		actor or third person	his person or person of another	him or another
OBJECTIVE STANDARD	person of reasonable firmness incapable of resisting		such nature or degree to overcome earnest resistance	person of reasonable firmness in his situation unable to resist	reasonable person in his situation lawfully unable to resist
NATURE OF OFFENSE—EXCLUDES			murder		
BARS RECKLESS CONDUCT	yes		yes	yes	

[4] State v. Boldt, 841 P.2d 1196, 1198 (Or. Ct. App. 1992).

STATE	TENNESSEE	TEXAS	UTAH	WASHINGTON	WISCONSIN
CITE	§ 39-11-504 (1991)	§ 8.05 (West 1994)	§ 76-2-302 (1995)	§ 9A.16.060 (West 1988)	§ 939.46 (West 1982)
TEMPORAL PROXIMITY	present, imminent, impending, continuous	felony: imminent	imminent	immediate	imminent
NATURE OF COERCIVE THREAT	death or serious bodily injury	felony: death or serious bodily injury non-felony: force or threat of force	unlawful physical force	death or grievous bodily injury	death or great bodily harm
OBJECT OF THREAT	person or third person	himself or another	him or third person	he or another	himself or another
OBJECTIVE STANDARD	well-grounded apprehension	person of reasonable firmness incapable of resisting	person of reasonable firmness in his situation would not have resisted	reasonable apprehension	reasonably believe
NATURE OF OFFENSE—EXCLUDES				murder or manslaughter	murder, but can mitigate to manslaughter
BARS RECKLESS CONDUCT	yes	yes	yes	yes	